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# The Prosecution Paradox: How the International Criminal Court Affects Civil War Peace Negotiations

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THE PROSECUTION PARADOX: HOW THE INTERNATIONAL CRIMINAL  
COURT AFFECTS CIVIL WAR PEACE NEGOTIATIONS

by

Julia Reilly

A DISSERTATION

Presented to the Faculty of  
The Graduate College at the University of Nebraska  
In Partial Fulfillment of Requirements  
For the Degree of Doctor of Philosophy

Major: Political Science

(Human Rights and Humanitarian Affairs)

Under the Supervision of Professor Courtney Hillebrecht

Lincoln, Nebraska

July, 2019

# THE PROSECUTION PARADOX: HOW THE INTERNATIONAL CRIMINAL COURT AFFECTS CIVIL WAR PEACE NEGOTIATIONS

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University of Nebraska, 2019

Advisor: Courtney Hillebrecht

Since the International Criminal Court (ICC)'s inception, observers have disagreed about how it would affect prospects for peace when it is involved in situations of ongoing conflict. Therefore, I ask, why do some of the civil war peace negotiations involving the ICC end with full peace agreements, while others end with resumed violence? I argue that how the Court affects the occurrence and outcome of peace negotiations is largely a function of the role that it plays in the situation. Due to its institutional design, the Court has the capacity to play either an oversight or a prosecutorial role in a conflict situation. Which role the Court actually assumes, however, is about more than its institutional design. I argue that what role the Court plays is conditioned by the combination of the formal nature of the Court's involvement in the situation, the Court's public relations approach, and the public statements of human rights and peace advocates about the Court's involvement and normative commitments. To provide systematic evidence that the Court might play a dual role in peace negotiations, I conduct logistic regression analysis of 367 instances of peace negotiations to end civil wars. The results confirm that international prosecution either makes peace negotiations more likely to completely fail or more likely to end in a comprehensive peace agreement. To advance a theory that explains this finding, I present three qualitative case studies of

peace negotiations in Uganda, Colombia, and Sri Lanka. These case studies suggest a fundamental paradox of ICC prosecution: the ICC has the potential to act as a guarantor of peace negotiations that is distinct among other international human rights promoters precisely because of its capacity to prosecute culpable leaders, but that when the ICC actually assumes the role of prosecutor, it becomes a spoiler of the peace. This suggests that if the ICC aspires to promote the interests of peace and justice in conflict situations where belligerents are attempting to negotiate peace, it should strive to play an oversight, rather than prosecutorial, role, and promote post-conflict justice broadly, instead of international prosecution specifically.

### **Dedication**

“Another world is not only possible, she is on her way. On a quiet day, I can hear her breathing.” –Arundathi Roy

To everyone, especially those who will never be acknowledged or remembered, who sacrificed of themselves to help her on her way.

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great blessings of my doctoral experience was being enveloped in a network of women who were committed to forming me as a scholar, and who time and again, expressed a faith in me that I did not always have in myself. I could list literal pages of ways you both have done that for me, and as with Courtney, I know I will never repay you, but I promise to be as generous as I can to those who come after me.

To the broader network of friends, colleagues, educators, and family who got me through graduate school—Maria Benes and Jeonghyeon Kim, you are the best office mates anyone could ask for, and in yet another absurd stroke of luck, two of the best human beings I’ve ever known. Clarisse Warren, Sami Lauf, and Shawn Ratcliff, each of you has, so many times, helped keep the things that drive me crazy from actually driving me crazy. Thank you, thank you, thank you. To the many other wonderful political science graduate students, and to the other faculty and staff who supported my work—Dr. Dona-Gene Barton, Dr. Kevin Smith, Helen Sexton, and David Csontos especially come to mind—thank you very, very much. To my grandparents, thank you for teaching me the value of an education, and for exemplifying how the process of becoming educated is expansive, constant, and endlessly worthwhile.

To my parents—writing a dissertation is supposed to be very hard, and writing this one certainly was, but there is toxic hard and there is fortifying hard, for me, this dissertation was only fortifying. Most of the reason for this is the family you built for me, and the profound sacrifices you simultaneously gave and modeled for me. Thank you for teaching me how to balance self-reliance and connection, chaos and stillness, and a sharp mind and a soft heart. Most of all, thank you for teaching me the difference between right and wrong.

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## **TABLE OF CONTENTS**

### **Chapter 1 | Introduction**



1.0 The puzzle	1
2.0 The research question	4
3.0 The academic context	12
4.0 The contribution	16
5.0 The argument	18
6.0 The empirical approach	21
7.0 The roadmap	24
<b>Chapter 2   Theory</b>	<b>26</b>
1.0 Introduction	26
2.0 Why peace negotiations' onset matters for their outcome	30
3.0 The literature review	32
3.1 The ICC and leader behavior	32
3.2 The ICC and leader behavior in civil conflict	34
3.3 Leader exit options and conflict termination	36
3.4 Leader exit options and peace agreements	38
4.0 The ICC's institutional design	40
5.0 The theory	46
5.1 How the ICC affects the onset of peace negotiations	53
5.1.1 How the ICC prevents peace negotiation onset	53
5.1.2 How the ICC promotes peace negotiation onset	57
5.2 How the ICC affects the outcome of peace negotiations	63
5.2.1 How the ICC spoils peace negotiations	66
5.2.2 How the ICC guarantees peace negotiations	67

6.0 The alternative explanation	69
7.0 Conclusion	70
<b>Chapter 3   The Dual Effect of International Prosecution</b>	<b>74</b>
1.0 Introduction	74
2.0 The dataset	77
3.0 The variables	79
3.1 The dependent variables	79
3.1.1 Peace negotiation outcome	80
3.1.2 Peace negotiation success	81
3.2 The independent variables	82
3.2.1 Domestic non-prosecution	83
3.2.2 Domestic prosecution	85
3.2.3 International non-prosecution	86
3.2.4 International prosecution	87
3.3 The control variables	88
3.3.1 Conflict intensity	88
3.3.2 Mediation previous year	89
3.3.3 Rebel capacity	90
3.3.4 Government physical violence	90
3.3.5 High court independence	91
4.0 The method	91
5.0 The results	92
6.0 The implications	98

7.0 Conclusion	99
<b>Chapter 4   The ICC as Spoiler in Uganda</b>	<b>102</b>
1.0 Introduction	102
2.0 The context	105
3.0 The case selection	107
4.0 The data and methods	108
5.0 The case study	110
5.1 The growing shadow of the ICC	110
5.2 The onset of the Juba Peace Process	114
5.3 The outcome of the Juba Peace Process	123
6.0 The implications for theory	135
7.0 The LRA and the ICC after Juba	137
8.0 Conclusion	139
<b>Chapter 5   The ICC as Guarantor in Colombia</b>	<b>141</b>
1.0 Introduction	141
2.0 The case selection, data, and methods	144
3.0 The context	146
3.1 State war crimes	151
3.1.1 The paramilitaries	152
3.2 The InterAmerican Court of Human Rights	154
3.3 NGO advocacy	156
3.4 The FARC's agency	157
3.5 The ICC's role as justice promoter	161

4.0 The case study	162
5.0 The ICC as guarantor: implementing the agreement	179
6.0 Conclusion	186
<b>Chapter 6   The Accountability Vacuum in Sri Lanka</b>	<b>189</b>
1.0 Introduction	189
2.0 The case selection, data, and methods	192
3.0 The context	193
3.1 Sri Lanka and the ICC	197
4.0 The case study	198
4.1 Peace negotiation onset	198
4.2 Peace negotiation outcome	202
4.2.1 The Oslo Declaration	202
4.2.2 Fragmentation	206
4.2.3 Disintegration	208
4.3 Battle resumes	211
4.3.1 International condemnation	211
4.3.2 Ceasefire collapses	216
4.3.3 Attempt at limited ceasefire	218
4.4 Decisive victory	220
5.0 The attempts at accountability	222
5.1 Presidential Commission of Inquiry	223
5.2 Permanent People's Tribunal on Sri Lanka	224
5.3 Lessons Learnt and Reconciliation Commission	225

5.4 UN Panel of Experts	228
5.5 OHCHR Investigation	231
6.0 The implications for the ICC	234
7.0 Conclusion	237
<b>Chapter 7   Conclusion</b>	<b>239</b>
1.0 The objectives	239
2.0 The findings	240
3.0 The findings' limitations	243
4.0 The research implications	245
5.0 The external validity	247
5.1 For criminal tribunals writ large	247
5.2 For international institutions	250
6.0 The policy implications	251

## LIST OF FIGURES

FIGURE	PAGE
1.6. Map of ICC situations and cases	23
2.5.1. How the ICC affects the onset of peace negotiations	55
2.5.2. How the ICC affects the outcome of peace negotiations	65
3.1.1. Summary of findings	76
3.1.1.1. Frequency table of mediation outcomes	81
3.1.1.2. Histogram of mediation outcomes	81
3.1.2.1. Frequency table of successful mediation	82
3.1.2.2. Histogram of successful mediation	82
3.2.1. Frequency table of justice mechanisms	83
3.2.1.1. Frequency table of the disaggregated observations of domestic non-...	84
3.2.1.2. Histogram of incidences of domestic non-prosecutorial justice...	85
3.2.2. Frequency table of disaggregated domestic prosecutions	86
3.3.1. Peace negotiations lasting longer than one year	88
3.5.1. Binomial logistic regression: successful peace negotiation	92
3.5.2. Multinomial logistic regression: peace negotiation outcomes (coefficients)	94
3.5.3. Multinomial logistic regression: peace negotiation outcomes (relative risk...	95
5.3.4. Graph of marginal effects of international prosecution on outcomes of...	97
5.3.5. Table of marginal effects of international prosecution on outcomes of peace...	97
4.2. Map indicating the location of Uganda	106
5.3. Map indicating the location of Colombia	147
6.3. Map indicating the location of Sri Lanka	194

## CHAPTER 1 | INTRODUCTION

### 1.0 The puzzle

In 2008, on the last Saturday in November, a group of men stood in a clearing in a forest, and waited. They waited all day and into the night, and when they were done waiting, they knew that the fragile peace they had spent two years trying to build had fallen apart.<sup>1</sup>

Two weeks before, they had agreed that Joseph Kony, the leader of the Lord's Resistance Army (LRA), would arrive at the clearing to sign the Final Peace Agreement, the product of two years of negotiation in Juba, South Sudan, and the culmination of twenty years of hostilities between the LRA and Uganda. As soon as it became clear to all that Kony had no intention of coming to the clearing or signing the agreement, the international delegation released a statement declaring the failure of the peace talks, and the Ugandan People's Defense Forces (UPDF) began planning renewed attacks on the LRA.<sup>2</sup> Just over two weeks later, on December 16, the UPDF commenced a bombing campaign on LRA bases in northern Uganda. They called it Operation Lightning Thunder.<sup>3</sup>

The LRA regrouped in the forests of the Democratic Republic of the Congo (DRC), where they coordinated an unprecedented attack. Over Christmas Eve and Christmas day, in the Congolese province of Haut-Eule, the LRA executed the largest-scale massacres of civilians that their long war had ever seen.<sup>4</sup> In forty-eight hours,

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<sup>1</sup> Atkinson, Ronald Raymond. *From Uganda to the Congo and Beyond: Pursuing the Lord's Resistance Army*. New York: International Peace Institute, 2009, p. 205.

<sup>2</sup> Ibid, p. 222

<sup>3</sup> Ibid, p. 222

<sup>4</sup> Human Rights Watch. "The Christmas Massacres." Human Rights Watch, 16 Feb. 2009. Web. 05 May 2016.

between eight hundred and a thousand civilians were brutally murdered, and hundreds more kidnapped.<sup>5</sup> An elderly man from the village of Doruma remembers:

The LRA were quick at killing. It did not take them very long and they said nothing while they were doing it...I knew all these people. They were my family, my friends, my neighbors. When they finished I slipped away and went to my home, where I sat trembling all over.<sup>6</sup>

Not even a month before, LRA representatives were part of an international delegation committed to brokering a deal to forge peace. What happened?

No one disputes that there is no unitary explanation for the breakdown of this peace process. One of the many factors that observers point to was the involvement of the International Criminal Court (ICC) in the peace process.<sup>7</sup> LRA leaders were reluctant to come to negotiations at all because of outstanding ICC warrants against them, and post-hoc explanations for their failure to arrive in the clearing to sign the final agreement point to the fact that they thought that the peace agreement would not do enough to help them avoid ICC prosecution.<sup>8</sup>

Less than a decade later, the Norwegian Nobel Committee chose to award Colombian President Juan Manuel Santos the Peace Prize for his work spearheading the Colombian peace process.<sup>9</sup> In its statement announcing the award, the Committee highlighted the difficult work that the framers of the peace accord had done in creating a system to provide justice for the victims of the conflict.<sup>10</sup> Today, Colombia is working to implement these systems.

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<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> Branch, Adam. "Uganda's civil war and the politics of ICC intervention." *Ethics & International Affairs* 21, no. 2 (2007): 179-198.

<sup>8</sup> Quinn, Joanna R. "Getting to peace? Negotiating with the LRA in northern Uganda." *Human Rights Review* 10, no. 1 (2009): 55-71.

<sup>9</sup> The Nobel Peace Prize for 2016. NobelPrize.org. Nobel Media AB 2019. Sat. 16 Mar 2019. <<https://www.nobelprize.org/prizes/peace/2016/press-release/>>

<sup>10</sup> Ibid



Based on Uganda's experience, observers might expect that Colombia's peace agreement struck the right balance between peace and justice because its framers were able to operate outside of the ICC's gaze. In fact, if anything, the opposite explanation holds. Indeed, at a conference for peace advocates, the ICC Prosecutor said:

The situation in Colombia is a clear example where my Office determined that a reasonable basis did exist to believe that war crimes and crimes against humanity had been committed by all sides in the armed conflict in Colombia; however, no investigation has been opened to date by my Office, because the principle of complementarity of jurisdictions came into play. In fact, there are also reasons to believe that the 'Shadow of the Court' induced prosecutors, courts, legislators and members of the Executive Branch to make certain policy choices in conducting investigations and prosecutions, and setting up accountability mechanisms, starting with the Justice and Peace Law. Representatives of my Office meet regularly with the Colombian authorities to consult on justice issues.<sup>11</sup>

Far from spoiling the peace agreement, the Court's oversight on justice mechanisms played a key role in ensuring that they were factored into the final agreement, which was ratified in November 2016, and is being implemented today.

How could the ICC have contributed to the utter failure of one peace process, and less than a decade later, help promote a peace process that was recognized by the Nobel Prize? This dissertation seeks to reconcile the stark differences between these two outcomes, and illustrate how the same Court can promote each vastly different outcome. In brief, I argue that the ICC can promote either the successful creation of a negotiated settlement, or the resumption of hostilities, because due to both its institutional design and situation-specific conditions, it can play either an oversight or a prosecutorial role in a conflict situation. When it plays an oversight role, it promotes negotiated settlement, but when it plays a prosecutorial role, it makes resumption of hostilities more likely.

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<sup>11</sup> Dziatkowiec, Paul, Christina Buchhold, Jonathan Harlander, and Massimiliano Verri. *Oslo Forum 2015 Meeting Report: Peacemaking in the new world disorder*. Oslo, Norway. 2015. Accessed 16 March 2019. <<http://www.hdcentre.org/wp-content/uploads/2016/06/Oslo-Forum-2015-Meeting-Report.pdf>>

## 2.0 The research question

Broadly, this dissertation asks: *How does the International Criminal Court affect the onset and outcome of peace negotiations to end civil wars?* This question can be disaggregated into several other questions. Under what conditions does ICC involvement in a conflict situation bring rebel and government leaders to the negotiating table, and under what conditions does it deter them from negotiation? Under what conditions does ICC involvement in a conflict situation make peace negotiations more likely to end in a full settlement, and under what conditions does it make peace negotiations more likely to end in resumption of hostilities?

By civil wars, I mean an armed conflict between a state government and a rebel group that surpasses 1,000 annual battle deaths, following the conventional political science definition.<sup>12</sup> By the onset of civil war peace negotiations, I mean both parties' decisions to come to public, formal peace negotiations with the aid of at least one external mediator. It is important to clarify that this by no means captures the full scope of actual civil war peace negotiations: in order to get to the point of public, formal peace negotiations, extensive informal and secret negotiations take place. This dissertation analyzes these phases of peace negotiations, but the first outcome I am interested in is whether the ICC makes formalized peace negotiations more likely to occur.

The second outcome this dissertation examines is what kind of agreement, if any, comes of these formalized peace negotiations. An absolutely crucial caveat for contextualizing this scholarship is that this study does not examine whether the ICC promotes lasting peace, but simply studies whether the ICC promotes the ratification of a

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<sup>12</sup> Singer, J. David, and Melvin Small. "Correlates of war project: International and civil war data, 1816-1992 (ICPSR 9905)." *Ann Arbor, MI: Inter-University Consortium for Political and Social Research* (1994).

comprehensive peace agreement that establishes a framework for peaceful government. So, by outcome of peace negotiations, I mean a set of outcomes ranging from the abandonment of talks with no agreement to the ratification of a comprehensive peace agreement. I do not systematically examine the implementation of such agreements, nor do I assess how well they do in securing peace.

Finally, this dissertation examines the effect of a specific institution: the International Criminal Court. This is an important distinction, as the ICC is not the only mechanism for international criminal accountability: there are various region-specific international tribunals, such as the International Criminal Tribunal for Yugoslavia (ICTY), regional courts, such as the InterAmerican Court for Human Rights (IACtHR), and hybrid courts, such as the Special Court for Sierra Leone. Of these, the ICC is the only accountability mechanism with a global reach, which allows for generalizability across a greater variety of cases.

The ICC is central to understanding the role of international criminal accountability in peace negotiations not only because its global reach gives the potential for greater external validity, but, perhaps much more importantly, because its symbolic importance to the global fight against impunity cannot be overstated. To understand this importance, we need to review the historical context and political processes driving the Court's formation.

The ICC was formed in 1998 to try the worst perpetrators of the worst crimes. The Court became operational in 2002, when its founding document, the Rome Statute, was ratified by 60 states. Since then, 64 more states have signed the Rome Statute. The Court is designed to promote individual criminal accountability for the gravest human

rights violations. The seat of the Court is in the Hague in the Netherlands, but it will also set up offices in areas under investigation.<sup>13</sup> The Court is funded by the states that are party to it, and also receives donations from governments, international organizations, and non-governmental organizations.<sup>14</sup>

The Court is composed of four bodies: the Presidency, the Registry, the Chambers, and the Office of the Prosecutor.<sup>15</sup> The Presidency administers the Court and serves as its external representative, and is comprised of three judges elected by and from the other eighteen judges on the Court.<sup>16</sup> These eighteen judges are housed in the Chambers, which consists of a Pre-Trial, Trial, and Appeals Chamber, and are charged with conducting cases that are selected by the Office of the Prosecutor.<sup>17</sup> All eighteen judges are elected by the Assembly of State Parties to the Court.<sup>18</sup> The Registry provides administrative and operational support to the other parts of the Court.<sup>19</sup> For this dissertation, the most important arm of the Court is the Office of the Prosecutor. The Office of the Prosecutor operates independently of the rest of the Court, and is tasked with gathering information on alleged abuses, determining whether the Court should pursue prosecution of offenders, and mounting investigations for the sake of issuing

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<sup>13</sup> International Criminal Court. *Understanding the International Criminal Court*. The Hague: International Criminal Court Registry. Accessed July 18, 2019. <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>, p. 4

<sup>14</sup> *ibid*, p. 4

<sup>15</sup> *ibid*, p. 8

<sup>16</sup> *ibid*, p. 9

<sup>17</sup> *ibid*, p. 9

<sup>18</sup> *ibid*, p. 9.

<sup>19</sup> *ibid*, p. 11

arrest warrants and conducting prosecutions.<sup>20</sup> The Prosecutor of the ICC is also elected by the Assembly of States Parties.<sup>21</sup>

The Court investigates and tries genocide, war crimes and crimes against humanity.<sup>22</sup> The Rome Statute defines each of these crimes. Genocide is a crime committed with the intent to destroy a group, or a part of a group; acts such as killing, causing serious harm, inflicting life conditions designed to destroy the group, imposing measures to prevent birth or forcibly transferring children are genocide if their intent is to eliminate at least part of a group.<sup>23</sup> War crimes are breaches of the Geneva Convention, including killing, torture, inhumane treatment, intentionally causing grave suffering, extensive destruction of property, depriving prisoners of war of rights, unlawful deportations and confinement, and hostage-taking.<sup>24</sup> Crimes against humanity are widespread and systematic attacks against civilian populations, and include acts such as murder, extermination, enslavement, deportation, imprisonment, torture, rape, enforced disappearance, apartheid, or acts that intentionally cause grave suffering.<sup>25</sup> If convicted of any of these crimes, the potential penalties include prison sentences up to and including life imprisonment, and fines or forfeiture of assets gained through the commission of crimes.<sup>26</sup>

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<sup>20</sup> *ibid*, p. 10-11. For much more complete description of these functions, please Section 4 of Chapter 2, on pages 40-46.

<sup>21</sup> International Criminal Court. *Office of the Prosecutor*. Accessed on July 18, 2019. <https://www.icc-cpi.int/about/otp>

<sup>22</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <https://www.refworld.org/docid/3ae6b3a84.html> [accessed 25 March 2019], p. 9

<sup>23</sup> *Rome Statute* Part 2, Article 6. For more extensive discussion of the crime of genocide, and of the political issues surrounding attempts to address it, please see Power, Samantha. "*A Problem from Hell*": *America and the Age of Genocide*. Basic Books, 2013.

<sup>24</sup> *Rome Statute*, Part 2, Article 8, Section 2

<sup>25</sup> *Rome Statute*, Part 2, Article 7, Section 2

<sup>26</sup> *Understanding the International Criminal Court*, p. 31

Advocates for international criminal accountability saw the formation of the ICC as the culmination an international advocacy campaign that began with the effort to mount the Nuremberg Trials and the International Military Tribunal for the Far East.<sup>27</sup> Both were military tribunals mounted by Allied nations after the end of the Second World War to hold Axis leaders to account for massive atrocities committed during the war. At Nuremberg, twenty-four men were accused of crimes, with seven sentenced to prison, twelve sentenced to death, and the remaining indicted but not sentenced.<sup>28</sup> At the International Military Tribunal for the Far East, twenty-nine Japanese leaders were charged, twenty-six stood trial and were found guilty, with seven sentenced to death, sixteen to life imprisonment, and three to shorter prison sentences.<sup>29</sup> They are significant in the development of international human rights law for many reasons; notably, the Nuremberg indictments were the first time the word “genocide” was used in an international judicial context.<sup>30</sup> Further, this was arguably a crucial period for developing the norm of individual criminal accountability for mass atrocity, as there was a considerable, coordinated international effort to make clear that guilt for the atrocities lay with individual leaders, rather than entire national publics.<sup>31</sup>

One of the many challenges of these tribunals was reconciling the various legal principles and systems of the different countries that mounted them.<sup>32</sup> These challenges

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<sup>27</sup> Schabas, *An introduction to the international criminal court*.

<sup>28</sup> Taylor, Telford. *The anatomy of the Nuremberg trials: a personal memoir*. Knopf, 2012.

<sup>29</sup> Ibid.

<sup>30</sup> *Nuremberg Trial Proceedings Vol. 1 Indictment: Count 3*. New Haven: The Avalon Project. Accessed on July 18, 2019. <https://avalon.law.yale.edu/imt/count3.asp>

<sup>31</sup> Steinacher, G. J. (2018). The Betrayal: The Nuremberg Trials and German Divergence Kim Christian Priemel. In *Holocaust and Genocide Studies*, Volume 32, Issue 1, Spring 2018, Pages 123–124,.

<sup>32</sup> *The anatomy of the Nuremberg trials.*; Jackson, Robert. *The Influence of the Nuremberg Trial on International Criminal Law*. Robert H. Jackson Center. Accessed on July 18, 2019. <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/>

led to an effort to create an international criminal tribunal that began during the Nuremberg Trials and persisted until the creation of the ICC.<sup>33</sup> Throughout the next three decades, the United Nations (UN) supported the work of creating legal definitions of crimes that could fall under international jurisdiction.<sup>34</sup> Further, the continued occurrence of mass atrocities, coupled with the persistent norm of sovereign immunity, reaffirmed the need for an international criminal tribunal. In particular, the 1990s saw a resurgence in mass atrocities that captured the world's attention and—to many—made the case for an institution to manifest the norms of international criminal accountability by prosecuting culpable leaders.<sup>35</sup> In response to mass atrocities committed during this war that divided what was formerly Yugoslavia, the United Nations Security Council passed a resolution to create an international criminal tribunal specifically to try culpable leaders in this conflict.<sup>36</sup> Then, in 1994, in response to the Rwandan genocide, the UN Security Council voted to create a second situation-specific criminal tribunal: the International Criminal Tribunal for Rwanda (ICTR).

The ICTY was particularly influential in the evolution of the norms and legal concepts that undergird the ICC.<sup>37</sup> The ICTY's mandate explicitly concerned individual criminal responsibility, as the Tribunal was designed to hold individuals, and not political organizations, accountable.<sup>38</sup> The mandate gave the ICTY jurisdiction over four categories of crimes: violations of the Geneva Conventions, violations of the laws of war,

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid, p. 7-8.

<sup>35</sup> Bosco, *Rough justice*, p. 34

<sup>36</sup> Schabas, *An introduction to the international criminal court*, p. 11

<sup>37</sup> Meron, Theodor. "War crimes in Yugoslavia and the development of international law." *American Journal of International Law* 88, no. 1 (1994): 78-87.

<sup>38</sup> United Nations International Residual Mechanism for Criminal Tribunals. "Mandate and Crimes Under ICTY Jurisdiction." Accessed on July 18, 2019. <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction>

crimes against humanity, and genocide.<sup>39</sup> From 1994 to 2019, the ICTY indicted 161 people for these crimes, sentenced 90, and acquitted 18.<sup>40</sup>

The ICTY and the ICTR showed the international community that international criminal tribunals could function effectively, and accelerated the effort to create a truly international tribunal with global reach.<sup>41</sup> Thus, in 1994, the UN General Assembly created a process to take the same draft statute that undergirded the ICTY and the ICTR and use it to formulate a global tribunal.<sup>42</sup> Then, in 1997, the UN General Assembly passed a resolution to convene a conference in Rome the following summer with the aim of creating a treaty that would design such a tribunal and codify state support for it.<sup>43</sup>

Over 160 states, as well as hundreds of international and nongovernmental organizations, sent delegates to the Rome Conference.<sup>44</sup> The process was propelled largely by NGOs,<sup>45</sup> but also by a group of states that referred to themselves as “the like-minded group.”<sup>46</sup> At the end of the conference, 120 states voted to adopt the Rome Statute of the International Criminal Court, and created a preparatory commission to continue the work of creating the court.<sup>47</sup>

Even during this process, proponents of the Court used its potential to punish culpable leaders as a central justification for its formation. For example, the Chairman of the Preparatory Commission for the International Criminal Court used the ICTY’s

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<sup>39</sup> *ibid.*

<sup>40</sup> United Nations International Residual Mechanism for the Criminal Tribunals. “Key Figures of the Cases.” Accessed on July 18, 2019. <http://www.icty.org/en/cases/key-figures-cases>; Out of the remaining 37 indicted people not sentenced or acquitted, 20 had their indictments and 17 died before they could stand trial.

<sup>41</sup> Schabas, *An introduction to the international criminal court*, p. 13

<sup>42</sup> *Ibid.*, p. 15.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Haddad, Heidi Nichols. *The Hidden Hands of Justice: NGOs, Human Rights, and International Courts*. Cambridge University Press, 2018.

<sup>46</sup> Bosco, *Rough justice*, p. 46.

<sup>47</sup> Schabas, *An introduction to the international criminal court*, p. 18



ongoing prosecution of former Serbian President Slobodan Milosevic as a symbol of the Court's promise.<sup>48</sup> More broadly, the late 1990s seemed to usher in a sea-change regarding criminal accountability for culpable leaders, a phenomenon termed the "justice cascade."<sup>49</sup> The arrest of former Chilean president Augusto Pinochet, just a few months after the Rome Conference, further signaled a shift in accountability and impunity norms.

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The ICC's global reach and focus on culpable leaders are central to its founding, and central to this dissertation. The conviction that leadership should not guarantee immunity was actually accompanied by examples of leaders, especially former heads of state, being prosecuted and punished for their crimes in international venues. This matters tremendously because it shows that, from its beginning, the ICC did not just symbolize a normative commitment, but was situated to continue a trend that was already occurring: the prosecution of culpable leaders in internationalized venues.

The ICC's central role in the international fight against impunity for leaders,<sup>51</sup> both of states and rebel groups, is the reason that we need to understand how it affects the specific period of peace negotiations, rather than just the general pursuit of peace. The assumption that leaders are self-interested undergirds all political science research: they will endeavor first to maintain power, and when that is in doubt, at least to secure favorable exit options. More particularly, those who study civil war hold that both rebel and state leaders' calculations of their exit options are key determinants of whether they

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<sup>48</sup> Kirsch, Phillippe, and Valerie Oosterfeld. "The Preparatory Commission for the International Criminal Court." *Fordham Int'l LJ* 25 (2001): 563, p. 564

<sup>49</sup> Sikkink, Kathryn. *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (The Norton Series in World Politics). WW Norton & Company, 2011.

<sup>50</sup> Bosco, *Rough justice*, p. 60.

<sup>51</sup> Throughout this dissertation, I will use the term "leaders" to refer to both rebel and state leaders, unless I specify rebel leaders or state leaders.

will continue the fight or seek peace.<sup>52</sup> Since the ICC was created to hold leaders accountable for the crimes they command, its involvement in a conflict situation stands to significantly affect how leaders perceive the set of possibilities for their post-conflict fates.<sup>53</sup>

### 3.0 The academic context

There are countless arguments about how the shadow of international criminal accountability affects prospects for peace. More narrowly, since the ICC began its work in the mid-2000s, social scientists, legal scholars, and advocates have examined how the Court's crusade against impunity affects prospects for peace in ongoing conflicts.

Initially, this literature could be divided into two opposing outlooks. The optimist camp argues that accountability is a positive force: it promotes respect for human rights and deters human rights abuses, although it has some limitations.<sup>54</sup> A popular optimist strain argues that international criminal tribunals have created a new age of accountability, which in and of itself will serve as a deterrent to crimes against humanity.<sup>55</sup> As prosecutions of human rights violators increase in number and visibility, political leaders become more and more aware that they too could be prosecuted for

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<sup>52</sup> Goemans, Hein E. "Fighting for survival: The fate of leaders and the duration of war." *Journal of Conflict Resolution* 44, no. 5 (2000): Croco, Sarah E. "The decider's dilemma: Leader culpability, war outcomes, and domestic punishment." *American Political Science Review* 105, no. 3 (2011): 457-477. 555-579; Prorok, Alyssa K. "Leader incentives and civil war outcomes." *American Journal of Political Science* 60, no. 1 (2016): 70-84; Prorok, Alyssa K. "Led astray: leaders and the duration of civil war." *Journal of Conflict Resolution* 62, no. 6 (2018): 1179-1204.

<sup>53</sup> Krcmaric, Daniel. "Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice." *American Journal of Political Science* 62, no. 2 (2018): 486-498.

<sup>54</sup> Akhavan, Payam. "Beyond impunity: can international criminal justice prevent future atrocities?." *American Journal of International Law* 95, no. 1 (2001): 7-31; Simmons, Beth A. *Mobilizing for human rights: international law in domestic politics*. Cambridge University Press, 2009; Dragu, Tiberiu, and Mattias Polborn. "The administrative foundation of the rule of law." *The Journal of Politics* 75, no. 4 (2013): 1038-1050; Jo, Hyeran, and Beth A. Simmons. "Can the International Criminal Court Deter Atrocity?." *International Organization* 70, no. 3 (2016): 443-475.

<sup>55</sup> Sikkink, Kathryn. "From state responsibility to individual criminal accountability: A new regulatory model for core human rights violations." *The politics of global regulation* (2009): 121-150; Sikkink, *The Justice Cascade*.

similar violations, and are thus deterred.

Skeptics argue that international criminal accountability is either unimportant or detrimental. Some argue that even when states ratify human rights treaties and codify commitments to accountability, they do not enforce them, and thus that the international criminal accountability regime cannot have far-reaching effects.<sup>56</sup> Detractors of international criminal accountability contend that it can worsen human rights conditions and make the commission of atrocities more likely.<sup>57</sup>

In more recent years, debates surrounding international criminal accountability have evolved to account for the fact that tribunals' effects are often conditional. Correspondingly, the scholarship now more explicitly delineates between evaluating tribunals as a whole and parsing out the conditions that affect how well they can fulfill their mandates.<sup>58</sup>

One of the most obvious sets of conditions that influences how international criminal accountability works is who mounts prosecutions and who their target is. At times, the ICC can be seen not as a truly international intervener, but a tool of state power,<sup>59</sup> and can thus, in civil war contexts, dissuade rebels from engaging in negotiations.<sup>60</sup> However, others have found that, no matter the target, the effect of international prosecutions cannot be disaggregated from the effect of international

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<sup>56</sup> Hathaway, Oona. "Do treaties make a difference? Human rights treaties and the problem of compliance." *Yale Law Journal* 111, no. 8 (2002): 1932-2042; Hafner-Burton, Emilie M., and Kiyoteru Tsutsui. "Human rights in a globalizing world: The paradox of empty promises." *American journal of sociology* 110, no. 5 (2005): 1373-1411.

<sup>57</sup> Ku, Julian, and Jide Nzelibe. "Do international criminal tribunals deter or exacerbate humanitarian atrocities." *Wash. UL Rev.* 84 (2006): 777.

<sup>58</sup> Dancy, Geoff. "Impact assessment, not evaluation: Defining a limited role for positivism in the study of transitional justice." *International Journal of Transitional Justice* 4, no. 3 (2010): 355-376.

<sup>59</sup> Tiemessen, Alana. "The International Criminal Court and the politics of prosecutions." *The International Journal of Human Rights* 18, no. 4-5 (2014): 444-461.; Hillebrecht, Courtney, and Scott Straus. "Who Pursues the Perpetrators?: State Cooperation with the ICC." *Human Rights Quarterly* 39, no. 1 (2017): 162-188.

<sup>60</sup> Branch, "Uganda's civil war and the politics of ICC intervention."

interventions more generally.<sup>61</sup>

An evolved optimistic understanding of the role of the ICC is that it can deter potential human rights violators if they seek legitimacy.<sup>62</sup> This might be an especially salient factor for rebels, who do not possess the same avenues that states do to achieve legitimacy, and thus can use their compliance with international human rights norms as a selling point.<sup>63</sup> Another version of this argument is that the ICC works as a “stigmatizer,” and deters atrocity by advancing the notion that atrocity is unacceptable.<sup>64</sup> The reasoning goes that if the state or rebels care about being acceptable, promoters of international criminal accountability can make them less likely to commit atrocity crimes.

These accounts tend to examine the ICC, and other international tribunals, as either prosecutors or norm promoters. In other words, empirical work—especially strictly positivist work—tends to operationalize ICC involvement in a situation only as formal prosecution, or perhaps slightly more broadly as formal investigation.<sup>65</sup> In this perspective, the effects of ICC involvement are not holistically examined, only the effects of the ICC as prosecutor.<sup>66</sup> More positivist work that focuses on the ICC as an investigator, and not just a prosecutor, is necessary to paint a fuller empirical picture of how the Court affects ongoing conflict and peace negotiations.

Other accounts do examine international criminal tribunals more broadly, but tend

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<sup>61</sup> Dancy, Geoff, and Eric Wiebelhaus-Brahm. "The impact of criminal prosecutions during intrastate conflict." *Journal of Peace Research* 55, no. 1 (2018): 47-61.

<sup>62</sup> Jo and Simmons. "Can the International Criminal Court Deter Atrocity?"

<sup>63</sup> Jo, Hyeran. *Compliant Rebels*. Cambridge University Press, 2015.

<sup>64</sup> Dancy, Geoff. "Searching for Deterrence at the International Criminal Court." *International Criminal Law Review* 17, no. 4 (2017): 625-655.

<sup>65</sup> Prorok, Alyssa K. "The (In) compatibility of peace and justice? The International Criminal Court and civil conflict termination." *International organization* 71, no. 2 (2017): 213-243.

<sup>66</sup> Sikkink, Kathryn, and Hun Joon Kim. "The justice cascade: The origins and effectiveness of prosecutions of human rights violations." *Annual Review of Law and Social Science* 9 (2013): 269-285; Krmaric, "Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice."; Dancy and Wiebelhaus-Brahm, "The impact of criminal prosecutions during intrastate conflict."

to examine them in their capacity as norm promoters.<sup>67</sup> These accounts fail to comprehensively account for how the fact that an international criminal tribunal can mount prosecutions conditions how it works as a norm promoter. These accounts tend to simply point to the normative implications of the public prosecution of culpable leaders, stating that prosecutions themselves, and their deterrent effects, are the main lever by which international criminal tribunals promote anti-impunity norms.<sup>68</sup> However, since international criminal tribunals can embark on justice-promoting activities other than mounting prosecutions, it is likely that these activities can also promote anti-impunity norms; these accounts have yet to explore this. While these accounts tend to do a better job of situating the ICC within a constellation of other human rights promoters,<sup>69</sup> they do not do enough to systematically account for the ICC's uniquely prosecutorial function. The fact that the ICC is the only global human rights promoter with the mandate and capacity to prosecute means that it occupies a unique place within this constellation<sup>70</sup> and likely means that it cannot promote anti-impunity norms in the same way that non-prosecutorial promoters can.

Both approaches are valuable and necessary, but to fully understand the ICC's conditional effects on peacemaking, we need to marry them. That is, we need to understand not only the ICC's prosecutorial work, but also its non-prosecutorial work, and we need to more systematically account for how the ICC's prosecutorial capacity

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<sup>67</sup> Benhabib, Seyla. "Claiming rights across borders: International human rights and democratic sovereignty." *American Political Science Review* 103, no. 4 (2009): 691-704; Dancy, Geoff, and Christopher J. Fariss. "Rescuing human rights law from international legalism and its critics." *Human Rights Quarterly* 39, no. 1 (2017): 1-36; Dancy, Geoff, and Florencia Montal. "From Law Versus Politics to Law in Politics: A Pragmatist Assessment of the ICC's Impact." *Am. U. Int'l L. Rev.* 32 (2016): 645.

<sup>68</sup> Akhavan, "Beyond impunity: can international criminal justice prevent future atrocities?."

<sup>69</sup> Sikkink, *The Justice Cascade*; Roach, Steven C. "How political is the ICC? Pressing challenges and the need for diplomatic efficacy." *Global Governance* 19, no. 4 (2013): 507-523.

<sup>70</sup> Daniels, Lesley-Ann. "The International Criminal Court and the Rebels' Commitment Problem." *Civil Wars* (2018): 1-22.

affects its non-prosecutorial work. Further, we need to better understand how the ICC's prosecutorial capacity conditions how it best interacts with other human rights promoters even in situations where it is not prosecuting.<sup>71</sup>

This difference in empirical emphasis might explain the competing perspectives on how ICC involvement affects attempts at peace. Those who argue that the ICC prolongs conflict<sup>72</sup> or spoils peace processes<sup>73</sup> are often really referring not simply to ICC involvement, but rather to ICC arrest warrants. Meanwhile, those who argue that the ICC can promote peace tend to focus more on its role as a norm promoter<sup>74</sup> or investigator.<sup>75</sup>

#### **4.0 The contribution**

All of this suggests that one of the most central factors that might condition the Court's impact on peace negotiations is the role the Court might play. Indeed, it is possible that scholars have come to different conclusions about the ICC's effect on peace because they have been focusing on different functions that the ICC has. As the previous section pointed out, an empirical focus on prosecution does not capture the full potential of prosecutorial institutions. Put otherwise, examining the effects of the stick of international prosecution is not the same as examining the broader impacts of the ICC. Prosecution is just one tool in the ICC's fight against impunity, and so examining the role of the ICC as an institution cannot be conflated with examining the role of international

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<sup>71</sup> Mendeloff, David. "Punish or Persuade? The Compellence Logic of International Criminal Court Intervention in Cases of Ongoing Civilian Violence." (2017): 395-421.

<sup>72</sup> Escribà-Folch, Abel, and Joseph Wright. "Human rights prosecutions and autocratic survival." *International Organization* 69, no. 2 (2015): 343-373; Prorok, "The (In) compatibility of peace and justice? The International Criminal Court and civil conflict termination."; Kremaric, "Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice."

<sup>73</sup> Branch, "Uganda's civil war and the politics of ICC intervention."; Dancy and Wiebelhaus-Brahm. "The impact of criminal prosecutions during intrastate conflict."

<sup>74</sup> Akhavan, Payam. "Are international criminal tribunals a disincentive to peace: reconciling Judicial romanticism with political realism." *Hum. Rts. Q.* 31 (2009): 624; Dancy and Montal. "From Law Versus Politics to Law in Politics: A Pragmatist Assessment of the ICC's Impact."

<sup>75</sup> Daniels, "The International Criminal Court and the Rebels' Commitment Problem."

prosecution. This dissertation examines both the role of ICC prosecution specifically, and the ICC as an institution broadly.

However, it is impossible to consider the ICC's role as an institution without accounting for its role as a prosecutor. One of this dissertation's central contentions is that, even in its non-prosecutorial functions, the ICC plays a distinctive role in human rights promotions precisely because it has the legal and material capacity to prosecute. In other words, this dissertation accounts for the fact that the ICC can play different roles at different times, or in different situations, and holds the ICC's prosecutorial function as central without only examining the effect of its prosecution. In doing so, it reconciles findings that the ICC can both prevent leaders from coming to or staying at the table and findings that the ICC can promote successful peace negotiations.

Secondly, much of the literature on how justice affects peace fails to explicitly disaggregate peace into its constituent parts. However, especially after a conflict, making peace is a sequential process, during which either the surrender of one side or negotiated settlement is a necessary step. In only looking at the specific step of negotiated settlement, this dissertation not only moves toward disaggregating peace into its constituent parts, but also contributes to a necessary turn in the transitional justice literature of more explicitly addressing scope conditions.<sup>76</sup> Even more broadly, this dissertation sees to identify the scope conditions in which the ICC works to promote peace and thus prevent human rights violations.

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<sup>76</sup> Vinjamuri, Leslie, and Jack Snyder. "Law and politics in transitional justice." *Annual Review of Political Science* 18 (2015): 303-327.

## 5.0 The argument

I argue that the ICC's effect on the onset and outcome of peace negotiations depends on whether it plays an oversight role or a prosecutorial role in conflict situations. If the ICC plays an oversight role in conflict situations, and only represents a latent threat of prosecution for leaders, it acts as a guarantor for peace negotiations. However, if the ICC plays a prosecutorial role, and therefore represents an active threat of prosecution for leaders, it acts as a spoiler of peace negotiations because it makes leaders more likely to believe that battle is a better route to preferable exit options. Whether the ICC plays a prosecutorial or oversight role is a function of an interplay of the ICC's institutional design and situation-specific conditions, such as the Court's strategy and whether other human rights promoters reinforce or contradict the Court's anti-impunity norms.

It is crucial to note that the fact that the ICC is an international institution with the power to prosecute violators of international criminal law undergirds its potential to act both as a guarantor and as a spoiler. That the ICC's capacity to prosecute leaders would result in it spoiling peace is logical: its prosecutorial capacity can change leaders' calculus of their exit options so as to make continuing the fight more attractive.<sup>77</sup>

What is less obvious is that the ICC's international scope and prosecutorial capacity are also crucial to its potential to be a guarantor. The ICC is unique among all international human rights organizations in that it has the legal capacity to prosecute any perpetrator in any country in the world. Therefore, the presence of the ICC in a conflict situation has implications for leaders' exit options that no other international institution concerned with promoting human rights can have. When the ICC is overseeing a conflict

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<sup>77</sup> Branch, "Uganda's civil war and the politics of ICC intervention." 179-198; Prorok, "The (In) compatibility of peace and justice? The International Criminal Court and civil conflict termination."; Krcmaric, "Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice."



situation, but has not yet assumed a prosecutorial role, leaders have incentives to dissuade the ICC from initiating prosecutorial proceedings in order to neutralize a latent threat to their post-conflict exit options.<sup>78</sup>

Whether the Court takes a prosecutorial approach or an oversight approach depends not only on the actions of the Court itself, but on the actions of the other actors around it, especially those who promote peace and human rights. I argue that whether the Court acts as a prosecutor or an overseer is conditioned by four factors, broadly articulated: legal classification of the Court's involvement in a conflict situation, the leadership style of the Prosecutor, the approach of domestic and international human rights NGOs and the approach of other potential guarantors to the peace process.

The first two factors concern the Court's approach, and condition whether the Court represents a latent or active threat to leaders' exit options. When the Court is only investigating a conflict situation, and has not yet issued indictments, it is much more able to play an oversight rather than prosecutorial role. However, the legal status of the Court's involvement in a conflict situation is not the only factor that conditions whether the Court plays an oversight or prosecutorial role. The approach of the Prosecutor can make even investigatory, non-prosecutorial phases of the Court's involvement in a conflict situation seem to pose a much more active threat of prosecution. Thus, when the Prosecutor plays a public, vocal role in threatening prosecution, the Court is more likely to play a prosecutorial role, and when the Prosecutor remains quiet on the prospect of indictment, the Court functions more as an overseer. In other words, even if the Court is only in an investigatory phase, an aggressive Prosecutor can make it play a prosecutorial rather than oversight role.

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<sup>78</sup> Daniels, "The International Criminal Court and the Rebels' Commitment Problem."

The second two factors concern the approach of other actors who seek to promote human rights or peace. Domestic and international human rights NGOs are crucial to whether the ICC plays a prosecutorial or oversight role. When these NGOs magnify the ICC's anti-impunity message, and use their public statements to consistently and uncompromisingly promote the ideals of the Rome Statute, they allow the ICC to act more as an overseer and less as a prosecutor. This is because non-prosecutorial actors' statements against impunity do not carry the same kind of threat to leaders that ICC statements against impunity carry, simply because these actors do not have the power to actually prosecute leaders. However, their statements still matter because they serve as an important reminder of the latent threat that ICC involvement represents and because they make it less necessary for the ICC to remind leaders that impunity is unacceptable, thus allowing the ICC to remain in an oversight rather than prosecutorial role.

Finally, it also matters whether other guarantors to the peace process reinforce or contradict the normative commitment of the Rome Statute. When other potential guarantors reinforce the normative commitments of the Rome Statute, as with human rights NGOs, this allows the ICC to play a quieter role in the peace process,<sup>79</sup> and thus facilitates the ICC playing an oversight role. However, if other guarantors publicly contradict the normative commitments of the Rome Statute, this might prompt the ICC into public reminders that violators cannot be granted impunity. This is especially true if these potential guarantors are powerful actors that could actually undermine the ICC's mission.<sup>80</sup> For potentially culpable leaders, public ICC reminders of their commitment to prevent impunity can amount to an escalation of the threat that the ICC poses to their exit

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<sup>79</sup> Haddad, *The Hidden Hands of Justice*.

<sup>80</sup> Bosco, *Rough justice*.

options. The more often and more aggressively the ICC issues such reminders, the more liable it is to slip into the role of prosecutor rather than overseer.

## 6.0 The empirical approach

I use mixed methods to advance this argument. My approach is mostly positivist but is also very thinly constructivist in its theoretical foundation and qualitative method. By thinly constructivist, I hearken to Hay's definition of a mode of constructivism that still prioritizes material factors over ideational factors, and causal over constitutive logics.<sup>81</sup> This contrasts with strict positivism, which does little to accommodate ideational factors and constitutive logics,<sup>82</sup> and thick constructivism, which prioritizes ideational over material factors and constitutive logics over causal logics. To show that international tribunals are systematically associated with both the comprehensive success and complete failure of peace negotiations, I use statistical analysis of a cross-national dataset of peace mediations from 1989 to 2010. I specify various logistic regression models that show that the involvement of an international criminal tribunal in a peace process makes both comprehensive success and comprehensive failure of a peace agreement more likely.

This quantitative analysis, however, is not at the heart of my empirical analysis. It simply provides a data-grounded justification for the need for a comprehensive theory of the involvement of international criminal tribunals in peace negotiations. It also shows that there is some empirical basis for claims that international prosecution spoils peace

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<sup>81</sup> Hay, Colin. *Political analysis: a critical introduction*. Macmillan International Higher Education, 2002, p. 206.

<sup>82</sup> By constitutive logic, I refer to a concept also termed by constructivist international relations theorists as "the logic of appropriateness," as contrasted with "the logic of consequences," which refers to causal logic. For more on the distinction between these two concepts, and how the logic of consequences pertains to positivist theories, and the logic of appropriateness pertains to constructivist theories, please see Sending, Ole Jacob. "Constitution, Choice and Change: Problems with the Logic of Appropriateness' and its Use in Constructivist Theory." *European Journal of International Relations* 8, no. 4 (2002): 443-470.

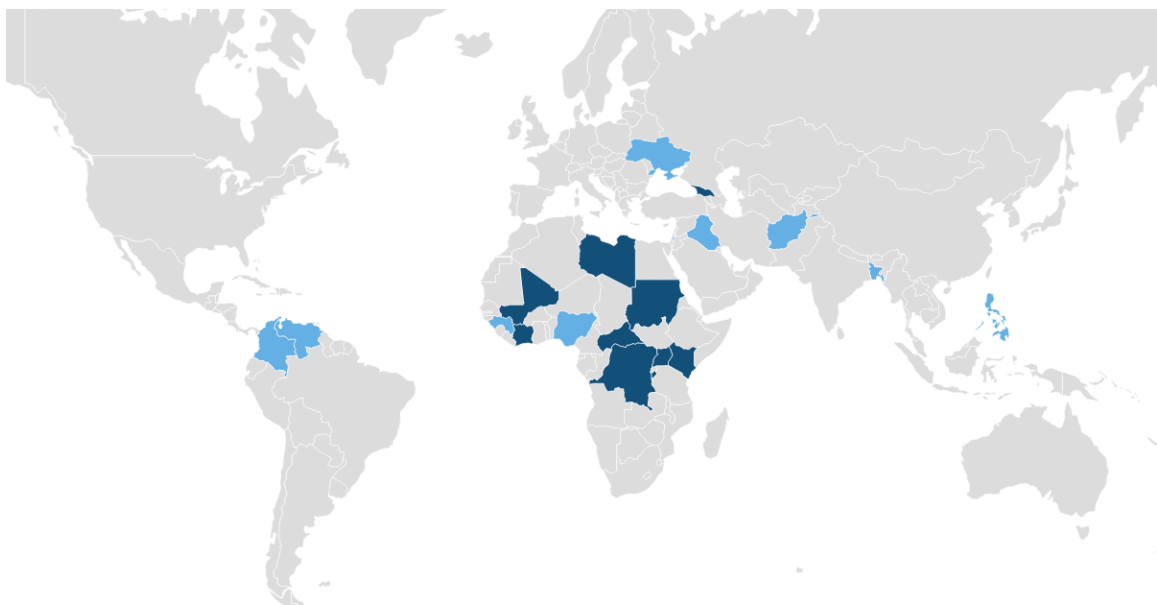
negotiations, as well as for claims that the involvement of international tribunals can promote a comprehensive peace agreement that goes beyond single cases.

Then, in order to move beyond the singular focus on international prosecutions, I turn to three qualitative case studies where I analyze the role of the ICC in peace processes. In these chapters, I analyze how the ICC affects the informal and formal peace processes surrounding the LRA insurrection in Uganda, the Colombian Civil War, and the Sri Lankan Civil War. These case studies use a thinly constructivist approach to build the theory that the role that the ICC assumes in a conflict situation conditions whether it helps to spoil or guarantee the peace. The slight constructivism arises out of analytical necessity, because I find that whether the ICC plays a prosecutorial role is not only a function of whether it has formally initiated prosecution, but of the role it assumes through its public posturing in the conflict, and the role that other actors assign to it. The fact that whether the Court plays an oversight role or a prosecutorial role is not purely a function of a formal, institutionally defined category, but is also a function of posturing and perception, means that a slightly constructivist frame is necessary to deduce these roles from the empirical evidence and to understand their effects.

The chapter that contains each qualitative case study contains an explanation of how data was collected and analyzed for that case, as well as a justification of the case selection. However, a more systematic justification of the qualitative case selection is also in order, especially given that the Court has been involved in far more countries than Uganda and Colombia. (Please consult Figure 1 for a map indicating all the countries that have seen an ICC preliminary examination or investigation.) In brief, I chose to focus on

Uganda because it is the classic case of the ICC spoiling peace negotiations,<sup>83</sup> and on Colombia because it is held up as an example of how the ICC might act as a peace promoter,<sup>84</sup> or even as a guarantor.<sup>85</sup> Since one of this dissertation's central objectives is to reconcile the two divergent narratives of the Court's effects on peace negotiations, I chose to include the two most quintessential cases of its failure and success in order to show that they can be accommodated within one theoretical framework.

Figure 1.6. Map of ICC Situations and Cases<sup>86</sup>



I include the case of Sri Lanka precisely because the ICC was not involved. In my theory, as well as in the evidence on the Ugandan and Colombian case, the role of human rights and peace advocates emerges as central to conditioning whether the Court plays the role of overseer or prosecutor. Indeed, the importance of civil society organizations

<sup>83</sup> Branch, "Uganda's civil war and the politics of ICC intervention."

<sup>84</sup> Hillebrecht, Courtney, Alexandra Huneeus, and Sandra Borda. "The Judicialization of Peace." *Harv. Int'l LJ* 59 (2018): 279.

<sup>85</sup> Daniels, "The International Criminal Court and the Rebels' Commitment Problem."

<sup>86</sup> This image was obtained from the ICC's official website, and is accessible at: <https://www.icc-cpi.int/SiteAssets/map-final.html#>.

advocating against impunity is so apparent in the Colombian case that the important question arises of whether the Court's role actually matters as much as the advocacy of the constellation of human rights advocates that it works within. In Sri Lanka, the full constellation of these actors—minus the ICC itself—was present in the civil war and peace negotiations, and they advocated vociferously against impunity for culpable leaders. Indeed, if anything, Sri Lanka saw more of these advocates, and many had much more international clout than those operating in Colombia. The fact that there was no comprehensive peace agreement in Sri Lanka, and that these actors' advocacy against impunity did not affect leaders' conflict behavior at all, helps build the theory that in the absence of ICC involvement, the notion of international criminal accountability can neither spoil peace negotiations nor promote a more robust peace agreement.

## **7.0 The roadmap**

This dissertation proceeds as follows. Chapter 2 outlines a theoretical framework, and contextualizes this framework within the literature on transitional justice and civil war peace negotiations. Chapter 3 conducts a quantitative cross-national analysis of data on 367 civil war peace negotiations, and finds that international prosecutions make negotiations either more likely to completely fail or more likely to result in a comprehensive agreement. Chapters 4, 5 and 6 consist of qualitative case studies of civil war peace negotiations that attempt to make sense of the quantitative findings of Chapter 3 and illustrate the theory articulated in Chapter 2.

Chapter 4 examines the case of Uganda, and argues that the ICC acted as a spoiler of the Juba Peace Process when it began to play the role of prosecutor rather than of overseer. Chapter 5 turns to the case of Colombia, and argues that, as Prosecutor

Bensouda asserted, the ICC was a guarantor of this peace process because it played the role of overseer, rather than prosecutor. Chapter 6 turns to the case of Sri Lanka, which saw no ICC involvement, to illustrate that the ICC's capacity to prosecute culpable leaders means that it can act as a peace guarantor in ways that other international human rights and peace proponents cannot. Chapter 7 concludes.

## CHAPTER 2 | THEORY

### 1.0 Introduction

This dissertation asks: *How does the International Criminal Court affect the onset and outcome of peace negotiations to end civil wars?* Empirical evidence, both in the literature and in the findings of Chapter 3 of this dissertation, shows that international tribunals can matter for the outcome of peace negotiations,<sup>87</sup> and that they matter differently than both domestic courts and non-prosecutorial justice mechanisms.<sup>88</sup> In general, non-prosecutorial justice mechanisms—whether they are mounted by a domestic or international actor—do not affect peace negotiations.<sup>89</sup> Prosecutions matter, but domestic and international prosecutions matter differently. In general, domestic prosecutions make peace negotiations more likely to fail.<sup>90</sup>

These findings contain several puzzles. Why might international prosecutions affect peace negotiations differently than domestic prosecutions? Why do international prosecutions affect the outcome of peace negotiations, while other international attempts to advance non-prosecutorial justice mechanisms do not? And most of all, how can international tribunals promote complete failure of peace negotiations in some cases, and yet contribute to the establishment of a comprehensive peace agreement in other cases?

This chapter articulates a theoretical framework to answer these questions. Concentrating my focus on the ICC, the only international tribunal with a global reach, I argue that the ICC plays a distinctive role among other international institutions, and

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<sup>87</sup> Branch, "Uganda's civil war and the politics of ICC intervention."; Daniels, "The International Criminal Court and the Rebels' Commitment Problem."

<sup>88</sup> Dancy and Wiebelhaus-Brahm. "The impact of criminal prosecutions during intrastate conflict."

<sup>89</sup> Höglund, Kristine, and Camilla Orjuela. "Winning the peace: conflict prevention after a victor's peace in Sri Lanka." *Contemporary Social Science* 6, no. 1 (2011): 19-37.

<sup>90</sup> Dancy and Wiebelhaus-Brahm. "The impact of criminal prosecutions during intrastate conflict."



especially among other international institutions designed to promote human rights. This is because, as a court designed to ensure international criminal accountability by ending impunity for leaders, it is the only international institution that can remove amnesty as a legal exit option for leaders. When the ICC issues an indictment for a leader, offers of amnesty to that leader, or state protection of that leader, become violations of international law. No other international institution or international organization promoting human rights has this power. Therefore, the ICC is distinct among international institutions and international human rights promoters in the way that it can constrain leaders' exit options. For this reason, the ICC's unique institutional design and prosecutorial function explain why it affects peace negotiations in ways that domestic or non-prosecutorial actors cannot.

The ICC's institutional design also undergirds the reason it can have such different effects on the outcome of peace negotiations. In this chapter, I argue that by virtue of a combination of the various formal modes of involvement the ICC can have in a conflict situation, the discretion the Court has in its public signaling surrounding situations, and the public stances of other human rights and peace advocates, the Court can act both as an overseer and as a prosecutor in conflict situations. However, it cannot assume these roles simultaneously. The difference in these roles accounts for the differential effects the Court can have on peace negotiations: when the Court acts as an overseer, it promotes successful negotiations, and when it acts as a prosecutor, it makes negotiations more likely to fail.

The ICC can have this conditional effect because when leaders' exit options are constrained, they can either be propelled to or repelled from the negotiating table. How

leaders perceive their exit options depends on a plethora of conflict conditions, many of which have been well-explored.<sup>91</sup> At a baseline, the possible exit options for leaders engaged in a civil war depend on whether they win the war. If they win the war, they maintain or achieve political incumbency. Leaders who are defeated, or who fail to achieve decisive military victory, have a several exit options: death,<sup>92</sup> imprisonment,<sup>93</sup> exile,<sup>94</sup> peaceful transfer of power,<sup>95</sup> and a guarantee of immunity from prosecution.<sup>96</sup> The last three can and often do occur in various combinations. The unfavorable prospects of all of these exit options, compared to the much more favorable outcome of political incumbency, often incentivize leaders in civil war to cling to power at all costs, and to double down in the conflict in order to gamble for resurrection.

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<sup>91</sup> Fearon, James D. "Why do some civil wars last so much longer than others?." *Journal of peace research* 41, no. 3 (2004): 275-301; De Rouen Jr, Karl R., and David Sobek. "The dynamics of civil war duration and outcome." *Journal of Peace Research* 41, no. 3 (2004): 303-320; Bapat, Navin A. "Insurgency and the opening of peace processes." *Journal of Peace Research* 42, no. 6 (2005): 699-717; Hultquist, Philip. "Power parity and peace? The role of relative power in civil war settlement." *Journal of Peace Research* 50, no. 5 (2013): 623-634; Clayton, Govinda. "Relative rebel strength and the onset and outcome of civil war mediation." *Journal of Peace Research* 50, no. 5 (2013): 609-622; Hartzell, Caroline A. "Settling civil wars: Armed opponents' fates and the duration of the peace." *Conflict Management and Peace Science* 26, no. 4 (2009): 347-365; Hartzell, Caroline, Matthew Hoddie, and Donald Rothchild. "Stabilizing the peace after civil war: An investigation of some key variables." *International organization* 55, no. 1 (2001): 183-208; Hoddie, Matthew, and Caroline Hartzell. "Signals of reconciliation: Institution-building and the resolution of civil wars." *International Studies Review* 7, no. 1 (2005): 21-40; Hartzell, Caroline A., and Matthew Hoddie. *Crafting peace: Power-sharing institutions and the negotiated settlement of civil wars*. Penn State Press, 2007; Glassmyer, Katherine, and Nicholas Sambanis. "Rebel—military integration and civil war termination." *Journal of Peace Research* 45, no. 3 (2008): 365-384; Werner, Suzanne, and Amy Yuen. "Making and keeping peace." *International Organization* 59, no. 2 (2005): 261-292; Fortna, Virginia Page. "Scraps of paper? Agreements and the durability of peace." *International Organization* 57, no. 2 (2003): 337-372; Fortna, Virginia Page. "Does peacekeeping keep peace? International intervention and the duration of peace after civil war." *International studies quarterly* 48, no. 2 (2004): 269-292; Howard, Lise Morjé. *UN peacekeeping in civil wars*. Cambridge University Press, 2008; Murdie, Amanda, and David R. Davis. "Problematic potential: The human rights consequences of peacekeeping interventions in civil wars." *Hum. Rts. Q.* 32 (2010): 49.

<sup>92</sup> Goemans, Hein E. "Which way out? The manner and consequences of losing office." *Journal of Conflict Resolution* 52, no. 6 (2008): 771-794.

<sup>93</sup> Ibid.

<sup>94</sup> Escribà-Folch, Abel, and Daniel Krmaric. "Dictators in exile: Explaining the destinations of ex-rulers." *The Journal of Politics* 79, no. 2 (2017): 560-575.

<sup>95</sup> Sutter, Daniel. "Settling old scores: Potholes along the transition from authoritarian rule." *Journal of Conflict Resolution* 39, no. 1 (1995): 110-128.

; Baturo, Alexander. *Democracy, dictatorship, and term limits*. University of Michigan Press, 2014.

<sup>96</sup> Escribà-Folch, Abel, and Joseph Wright. "Human rights prosecutions and autocratic survival." *International Organization* 69, no. 2 (2015): 343-373.

I argue that the involvement of the ICC is one such conflict condition that needs to be better understood because it can affect leaders' exit options. In this chapter, I outline that when the ICC plays an oversight role in conflict situations, actors can be propelled to and incentivized to stay at the negotiating table long enough to come to a comprehensive agreement settling the conflict and establishing a new framework for government. However, when the ICC plays a prosecutorial role in conflict situations, it increases the chance that the peace process will fail. This is because it instills a fear of arrest that deters leaders from effectively engaging in peace negotiations and because it changes the panoply of leaders' exit options so as to make continuing the fight more attractive.

By an oversight role, I mean that the Court acts as a monitor of the human rights situation in the conflict and an advocate for the indispensability of justice in the peace process. Crucially, the ICC is not perceived to act as an investigator or potential punisher of specific leaders, and is instead perceived as a monitor of the conflict situation in general. By a prosecutorial role, I mean that the Court acts as the institution that will either put culpable leaders on trial, or that will ensure that they stand trial in a venue it deems legitimate. It emphasizes that its investigatory capacity is a function of this mission, and that the information it collects will be used as evidence to hold culpable leaders to account.

Whether the Court acts as an overseer or a prosecutor is not entirely at the Court's discretion, and is largely but not entirely a function of the broader political context. The role of domestic civil society, domestic justice mechanisms, regional courts, and the Court's own evolution and learning throughout its twenty year history are all key factors

here. This chapter will articulate the contextual factors that condition whether the Court acts more as a overseer or as a prosecutor.

This chapter proceeds in six subsequent sections. The next section discusses the theoretical relationship between the onset and outcome of peace negotiations, and why we cannot and should not understand them independently of each other. The third section reviews what we already know about how the ICC shapes leaders' behavior, particularly in conflict, and what we know about how leaders' exit options shape prospects for peace. The fourth section provides a brief overview of how the ICC works, as the ICC's institutional design is crucial for this theory. The fifth section articulates the theory itself, first by articulating how the ICC can both propel leaders toward and keep them from the negotiating table and then by articulating how the ICC can alternately act as either a spoiler or guarantor of subsequent formal peace negotiations. The sixth section addresses alternative explanations, especially the argument that the ICC does not impact conflict termination. The seventh section concludes, and points the way towards the empirical chapters.

## **2.0 Why peace negotiations' onset matters for their outcome**

Since this study's objective is to understand how the ICC conditions possibilities for civil war peace agreements, and since it situates its contribution in terms of a narrow focus on one component necessary for lasting peace—a robust peace agreement—it is worth asking why it should also consider the onset of peace negotiations. The answer is that we cannot understand what happens at the negotiating table without understanding how leaders got there. The onset and outcome of peace negotiations of civil wars should not be understood independently of each other for several reasons.

First, actors' experiences, priorities, and constraints in the onset of peace negotiations—that this, the liminal period during which two warring sides build enough mutual understanding to agree to begin formal talks—are unavoidably carried on to the talks themselves. It is easy to anticipate how actors' interests and constraints during the conflict would affect formal talks, but this dissertation will show that actors' experiences during the informal peace talks can also shape their interests and constraints during formal peace talks. This can be especially true for rebel groups, for whom the period of negotiating the beginning of formal talks often marks the period when they transition from not only a militant actor, but a diplomatic, legalistic actor as well, and where rebels become informed and sensitized to the full spectrum of political issues undergirding peace negotiations.<sup>97</sup> This often includes the specter of the ICC.

Second, this dissertation will not only show how the priorities and apprehensions that define leaders' approaches to formal peace negotiations are often heavily influenced by what happens in the period leading up to the onset of formal peace negotiations, but it will show how what happens during this period can heavily influence how human rights actors, especially the ICC, approach formal peace talks.

Third, a key factor in the success of formal peace negotiations is whether leaders find themselves to be sufficiently empowered during the negotiations—that is, whether they feel they have the role that they deserve.<sup>98</sup> The groundwork for leaders' role in peace talks is inevitably laid during the lead-up to the onset of peace negotiations.

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<sup>97</sup> Cornell, Svante E. "Autonomy and conflict." *Ethnoterritoriality and Separatism in the South Caucasus—Cases in Georgia*, Uppsala University: Uppsala (2001); Sriram, Chandra. *Peace as governance: Power-sharing, armed groups and contemporary peace negotiations*. Springer, 2008; Vandeginste, Stef, and Chandra Lekha Sriram. "Power sharing and transitional justice: a clash of paradigms?." *Global Governance* 17, no. 4 (2011): 489-505.

<sup>98</sup> Greig, J. Michael, and Patrick M. Regan. "When do they say yes? An analysis of the willingness to offer and accept mediation in civil wars." *International Studies Quarterly* 52, no. 4 (2008): 759-781; Clayton,

Finally, the way the ICC functions and the way leaders view the ICC before the onset of formal peace talks can significantly influence how they perceive the Court during formal negotiations. At the onset phase, the involvement of the ICC can incentivize or deter leaders from participating in peace negotiations. ICC involvement can incentivize leaders to participate in talks if they understand peace negotiations to be a potential forum for “pre-arrest bargaining.”<sup>99</sup> That is, if leaders have or fear arrest warrants, and they think they are likely to be apprehended, ICC involvement in the conflict might incentivize them to become involved in peace negotiations to attempt to negotiate the degree of international accountability they can expect.<sup>100</sup> However, if leaders do not anticipate a flexible ICC that is willing to bargain over such issues, ICC involvement will deter leaders from participating in negotiations.<sup>101</sup> This dissertation’s theory affirms this insight, but goes further by specifying the conditions under which leaders can anticipate a flexible ICC. However, to better understand why the ICC stands to matter so much for the outcome of civil conflict, I turn to the extant literature on how the ICC shapes leaders’ behavior, and how leaders’ behavior shapes how civil conflict ends.

### **3.0 The literature review**

#### **3.1 The ICC and leader behavior**

Since the ICC’s foundation, scholars and practitioners have advanced many explanations for how it shapes state behavior. Indeed, understanding state behavior

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Govinda. "Relative rebel strength and the onset and outcome of civil war mediation." *Journal of Peace Research* 50, no. 5 (2013): 609-622; Kaplow, Jeffrey M. "The negotiation calculus: Why parties to civil conflict refuse to talk." *International Studies Quarterly* 60, no. 1 (2015): 38-46;

<sup>99</sup> Ritter, Emily Hencken, and Scott Wolford. "Bargaining and the effectiveness of international criminal regimes." *Journal of Theoretical Politics* 24, no. 2 (2012): 149-171.

<sup>100</sup> Ibid, p. 164

<sup>101</sup> Ibid, p. 164

regarding the Court is crucial to its mission, as its ability to operate hinges on state cooperation.<sup>102</sup> Therefore, it is perhaps good news for the Court that states have incentives to cooperate with it. Cooperation with the Court can serve as a strategically advantageous signal of cooperation with human rights and the rule of law.<sup>103</sup> Cooperation with the Court can also function as a signal that a given state complies with its treaty obligations, another advantageous reputation.<sup>104</sup> This reputation is advantageous because it can help the state enhance its position when negotiating future treaties or signaling about future foreign policy action.<sup>105</sup> Having a reputation for complying with treaty obligations also establishes a state as trustworthy within the international community, which increases its chances of being included in higher-level negotiations.<sup>106</sup>

State leaders can also use the ICC as a tool to further their own political ends. Therefore, the way that the ICC affects state behavior is often contingent on domestic political incentives. When leaders see the Court as a helpful tool to constrain their political opponents, they will cooperate with it.<sup>107</sup> For example, leaders might see the ICC as an “international legal lasso” with which they can remove a political foe: in such cases, state leaders will cooperate with the ICC if the ICC investigates people outside of the ruling coalition, and if the ICC agrees to investigate and indict opposition figures before investigating and indicting anyone else in the country.<sup>108</sup> However, if state leaders fear

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<sup>102</sup> Peskin, Victor. "Caution and confrontation in the International Criminal Court's pursuit of accountability in Uganda and Sudan." *Hum. Rts. Q.* 31 (2009): 655; Haddad, *The Hidden Hands of Justice*.

<sup>103</sup> Simmons, Beth, and Allison Danner. "The International Criminal Court." *Routledge Handbook of International Law* (2009): 239.

<sup>104</sup> Simmons, Beth. "Treaty compliance and violation." *Annual Review of Political Science* 13 (2010): 273-296.

<sup>105</sup> Keohane, Robert O. *After hegemony: Cooperation and discord in the world political economy*. Princeton University Press, 2005.

<sup>106</sup> Ibid.

<sup>107</sup> Hillebrecht and Straus. "Who Pursues the Perpetrators?: State Cooperation with the ICC", p. 129

<sup>108</sup> Ibid, p. 170

that the Court's involvement will constrain—or even punish—they before it constrains their opponents, they are less likely to cooperate with it.<sup>109</sup> In peacetime, these opponents are domestic political opposition, but during civil wars, they can be peaceful political opponents, or they could be rebel leaders. The next section exclusively considers scholarship that pertains specifically to the context of civil wars.

### 3.2 The ICC and leader behavior in civil conflict

The literature on international criminal accountability in conflict can be divided into three camps: some say it makes conflict worse, some say it increases prospects for peace, and some say it does not matter. The most optimistic camp argues that international criminal accountability is a positive force: it promotes respect for human rights and deters human rights abuses, in spite of some limitations.<sup>110</sup> One optimist strain argues that international criminal tribunals have created a new age of accountability, which in and of itself will serve as a deterrent to atrocity crimes in war.<sup>111</sup> The logic goes that as prosecutions of human rights violators become more common and visible, political leaders will become increasingly aware that they too could be prosecuted, and will thus be deterred from committing violations. Further, there is some evidence that the ICC affects how belligerents choose to fight. When actors want the international

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<sup>109</sup> Ibid.

<sup>110</sup> Akhavan, "Beyond impunity: can international criminal justice prevent future atrocities?"; Simmons, Beth A. *Mobilizing for human rights: international law in domestic politics*. Cambridge University Press, 2009; Dragu, Tiberiu, and Mattias Polborn. "The administrative foundation of the rule of law." *The Journal of Politics* 75, no. 4 (2013): 1038-1050; Jo and Simmons 2014, Jo and Simmons. "Can the International Criminal Court Deter Atrocity?"

<sup>111</sup> Sikkink, *The Justice Cascade*; Kim, Hunjoon, and Kathryn Sikkink. "Explaining the deterrence effect of human rights prosecutions for transitional countries." *International Studies Quarterly* 54, no. 4 (2010): 939-963; Sikkink and Kim. "The justice cascade: The origins and effectiveness of prosecutions of human rights violations."



community to consider them politically legitimate, the involvement of the ICC in their conflict will prompt them to curtail their targeting of civilians.<sup>112</sup>

Two camps of skeptics argue that international criminal prosecution is either detrimental or of negligible impact. Some point out that even when states ratify human rights treaties and codify agreements to enforce international accountability standards, they do not adhere to these obligations, and argue that this means that the international criminal accountability regime cannot have far-reaching effects.<sup>113</sup> Detractors of international criminal accountability contend that it can worsen human rights conditions and make atrocities more likely to occur.<sup>114</sup> They argue that when a state chooses to use an international prosecution instead of offering amnesty to rebels, they prolong the conflict, leading to more deaths.<sup>115</sup> Others argue that even if they occur after the conflict has ended, international prosecutions worsen human rights conditions because they heighten divisions in the country, which could exacerbate conflict or undermine attempts to create democracy.<sup>116</sup>

An important branch of the literature on international courts' effects within the context of conflict focuses on how they affect leaders' exit options. Scholars agree that the involvement of an international court reduces leaders' exile options—if indicted, a leader is less easily able to seek refuge in friendly bordering states, and also is less able to

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<sup>112</sup> Jo and Simmons. "Can the International Criminal Court Deter Atrocity?"

<sup>113</sup> Hathaway, "Do treaties make a difference? Human rights treaties and the problem of compliance."; Hafner-Burton, Emilie M., and Kiyoteru Tsutsui. "Human rights in a globalizing world: The paradox of empty promises." *American journal of sociology* 110, no. 5 (2005): 1373-1411.

<sup>114</sup> Ku and Nzelibe. "Do international criminal tribunals deter or exacerbate humanitarian atrocities."

<sup>115</sup> Goldsmith, Jack, and Stephen D. Krasner. "The limits of idealism." *Daedalus* 132, no. 1 (2003): 47-63, p. 51

<sup>116</sup> Snyder, Jack, and Leslie Vinjamuri. "Trials and errors: Principle and pragmatism in strategies of international justice." *International security* 28, no. 3 (2004): 5-44.

expect an offer of amnesty.<sup>117</sup> However, they disagree on the implications of these limited exit options.

Gilligan posits that international criminal tribunals can prevent some atrocities “on the margins” because they reduce exile options for culpable leaders, thus making them more likely to be quickly apprehended by tribunals and therefore less likely to commit atrocity crimes.<sup>118</sup> However, empirical tests of this reasoning show that diminishing prospects for the safe exile of culpable leaders actually make those leaders more likely to commit atrocity crimes,<sup>119</sup> because diminishing exile options increase leaders’ incentives to violently gamble for resurrection.<sup>120</sup> To understand why the ICC’s effect on leaders’ exit options is so crucial to its effect on prospects for peace more broadly, we need to turn to the literature on the importance of leaders’ exit options on the duration and termination of civil conflict.

### **3.3 Leader exit options and conflict termination**

Conflicts end when leaders decide they should end, or when leaders can no longer fight. All conflicts—including civil wars—necessarily end either in negotiated settlement or decisive victory; the fighting only stops when both sides decide to stop fighting, or when one side can no longer fight. For this reason, negotiated settlement is the only path to conflict termination—and perhaps to the hazier, less easily operationalized outcome of peace—that does not necessarily involve the overwhelming military destruction of one side. These peace negotiations almost always involve external overseers—that is,

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<sup>117</sup> Krcmaric, "Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice."

<sup>118</sup> Gilligan, Michael J. "Is enforcement necessary for effectiveness? A model of the international criminal regime." *International Organization* 60, no. 4 (2006): 935-967, p. 935

<sup>119</sup> Krcmaric, "Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice."

<sup>120</sup> Ritter and Wolford. "Bargaining and the effectiveness of international criminal regimes."; Krcmaric "Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice."

mediators who are nationals of the country in conflict. These overseers are often representatives of foreign governments, international organizations, and occasionally influential NGOs.

Leaders' perceptions of their exit options are key to understanding when belligerents come to the table in civil wars, and when they arrive at negotiated settlements. Most explanations for the onset of civil war peace negotiations assume that leaders will fight until it is no longer rational for them to do so. Part of this calculus has to do with the balance of power between the belligerents: evenly matched opponents tend to fight longer, as they each have a decent chance of winning.<sup>121</sup> Indeed, the onset of peace negotiations is likeliest at a specific, limited threshold of rebel strength: the warring parties are most likely to negotiate when the rebels are too strong to be entirely suppressed by the government, but too weak to overthrow it entirely.<sup>122</sup>

All of these explanations take for granted the fundamental mistrust between governments and rebels that underlies all civil wars. This mistrust is not just a function of the grievances that led the rebels to take up arms, but is inherent to the asymmetry between rebels and governments. At the end of a civil war, there can only be one army left, and it must be controlled by the government; therefore, for a negotiated settlement to be successful, rebels must lay down their arms, while the government can retain its armed forces.<sup>123</sup> This makes credible commitments between governments and rebel groups

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<sup>121</sup> Fearon, "Why do some civil wars last so much longer than others?."; De Rouen Jr, Karl R., and David Sobek. "The dynamics of civil war duration and outcome."

<sup>122</sup> Bapat, Navin A. "Insurgency and the opening of peace processes." *Journal of Peace Research* 42, no. 6 (2005): 699-717; Hultquist, Philip. "Power parity and peace? The role of relative power in civil war settlement." *Journal of Peace Research* 50, no. 5 (2013): 623-634; Clayton, Govinda. "Relative rebel strength and the onset and outcome of civil war mediation." *Journal of Peace Research* 50, no. 5 (2013): 609-622.

<sup>123</sup> Walter, Barbara F. "The critical barrier to civil war settlement." *International organization* 51, no. 3 (1997): 335-364.

particularly difficult, and means that rebels, and especially rebel leaders, have extremely acute fears about their post-war fates.

Coming to the negotiating table is a meaningful concession by the government of the rebels' power, and coming to an agreement is an inevitable risk to rebels' post-conflict fates. Leaders are likely to feel the impacts of these concessions and risks the most acutely, and the more apprehensions leaders have about their postwar fates, the less likely they are to come to the negotiating table.<sup>124</sup> An important source of fear for leaders might be international prosecution. Indeed, there is not only a well-known argument,<sup>125</sup> but empirical, quantitative evidence that international prosecution makes leaders more likely to continue fighting because they would rather gamble for resurrection than face prosecution.<sup>126</sup>

### **3.4 Leader exit options and peace agreements**

The same power asymmetry and fears about exit options that makes it difficult for rebels and governments to credibly commit to formal negotiations leads to credible commitment problems throughout negotiations.<sup>127</sup> Thus, it is basically canon that the involvement of third party mediators can mitigate this credible commitment problem and promote the creation of a negotiated settlement.<sup>128</sup> Much of the literature on civil war

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<sup>124</sup> Staniland, Paul. "States, insurgents, and wartime political orders." *Perspectives on politics* 10, no. 2 (2012): 243-264; Prorok, "Leader incentives and civil war outcomes."

<sup>125</sup> Goldsmith and Krasner. "The limits of idealism."; Snyder and Vinjamuri. "Trials and errors: Principle and pragmatism in strategies of international justice."

<sup>126</sup> Prorok, "The (In) compatibility of peace and justice? The International Criminal Court and civil conflict termination."; Kremp, "Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice."

<sup>127</sup> Walter, Barbara F. "Bargaining failures and civil war." *Annual Review of Political Science* 12 (2009): 243-261.

<sup>128</sup> Walter, Barbara F. *Committing to peace: The successful settlement of civil wars*. Princeton University Press, 2002; Fortna, Virginia Page. "Does peacekeeping keep peace? International intervention and the duration of peace after civil war." *International studies quarterly* 48, no. 2 (2004): 269-292.

peace negotiations is dedicated to understanding the conditions under which such mediations are likely to succeed, and the characteristics that successful mediators share.

Many of these explanations hinge on leaders' exit options. In particular, post-conflict power-sharing mechanisms are key because they provide rebels with increased assurance that they will be safe after they lay down their arms<sup>129</sup> and that they will be incorporated into post-war institutions, which would further enhance their safety.<sup>130</sup> The involvement of third party guarantors can also affect leaders' perceptions of their exit options. International monitors can reduce fear, uncertainty and information asymmetries between the parties,<sup>131</sup> which helps reduce leaders' temptation to abandon peace talks and resume fighting in a gamble for resurrection.<sup>132</sup>

However, this literature does not disaggregate third party guarantors beyond basic typologies. The only actor that is systematically analyzed as an individual, unique actor, and not merely as one of a broader type, is the United Nations. Indeed, the literature on the role of UN peacekeeping in civil wars is a literature all its own.<sup>133</sup> The literature on

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<sup>129</sup> Hartzell, Caroline A. "Settling civil wars: Armed opponents' fates and the duration of the peace." *Conflict Management and Peace Science* 26, no. 4 (2009): 347-365.

<sup>130</sup> Hartzell, Caroline, Matthew Hoddie, and Donald Rothchild. "Stabilizing the peace after civil war: An investigation of some key variables." *International organization* 55, no. 1 (2001): 183-208; Hoddie, Matthew, and Caroline Hartzell. "Signals of reconciliation: Institution-building and the resolution of civil wars." *International Studies Review* 7, no. 1 (2005): 21-40; Hartzell, Caroline A., and Matthew Hoddie. *Crafting peace: Power-sharing institutions and the negotiated settlement of civil wars*. Penn State Press, 2007; Glassmyer, Katherine, and Nicholas Sambanis. "Rebel—military integration and civil war termination." *Journal of Peace Research* 45, no. 3 (2008): 365-384.

<sup>131</sup> Mattes, Michaela, and Burcu Savun. "Fostering peace after civil war: Commitment problems and agreement design." *International studies quarterly* 53, no. 3 (2009): 737-759; Mattes, Michaela, and Burcu Savun. "Information, agreement design, and the durability of civil war settlements." *American Journal of Political Science* 54, no. 2 (2010): 511-524.

<sup>132</sup> Werner, Suzanne, and Amy Yuen. "Making and keeping peace." *International Organization* 59, no. 2 (2005): 261-292.

<sup>133</sup> Fortna, Virginia Page. "Scraps of paper? Agreements and the durability of peace." *International Organization* 57, no. 2 (2003): 337-372; Fortna, Virginia Page. "Does peacekeeping keep peace? International intervention and the duration of peace after civil war." *International studies quarterly* 48, no. 2 (2004): 269-292; Howard, Lise Morjé. *UN peacekeeping in civil wars*. Cambridge University Press, 2008; Murdie, Amanda, and David R. Davis. "Problematic potential: The human rights consequences of peacekeeping interventions in civil wars." *Hum. Rts. Q.* 32 (2010): 49.

civil war mediation stands to gain significantly from studies that focus on specific guarantors, so that they can be understood beyond type. This dissertation helps to fill this gap by arguing that the ICC can act as a guarantor of peace negotiations, but only under certain conditions.

#### **4.0 The ICC's institutional design**

The ICC is designed to promote individual criminal accountability for grave human rights violations: its purpose is to try the worst perpetrators of the worst crimes. The aspect of the Court's institutional design and legal mandate that is perhaps most central to this theoretical framework is the fact that it assumes individual criminal responsibility, and focuses not so much on all people who have committed atrocity crimes, but on the leaders who command and coordinate the commission of large-scale human rights violations. Article 15 articulates a broad standard of individual criminal responsibility,<sup>134</sup> saying that individuals can be held accountable when they not only commit but order, solicit, induce, incite, facilitate, aid, abet, or "contribute to the commission of" a crime.

Central to the Court's formation is the intention that it be a court of last resort. The ICC was designed to be used only in situations where there is no other option. The Rome Statute codifies this as the complementarity principle in Article 17, Section 1, which states that a case will be not be admissible before the Court when:

- (a) The Case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unable or unwilling genuinely to carry out the investigation or prosecution;
- (b) The Case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely

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<sup>134</sup> UN General Assembly, *Rome Statute*, p. 23

to prosecute;<sup>135</sup>

In other words, in any case of competing claims for jurisdiction between the ICC and a legitimate, competent domestic court, the domestic court's claims always win. Indeed, Luis Moreno Ocampo, the first Prosecutor of the ICC, repeatedly expressed that crimes that fall within the ICC's jurisdiction are ideally prosecuted on the domestic level by a competent and fair domestic judiciary.<sup>136</sup> When the Court was first formed, many within and outside of the Court hoped that it would have a catalyzing effect on domestic prosecutions: that the Court's effects would be best seen not in the cases it took on itself, but rather in the domestic prosecutions that would supplant potential ICC cases.<sup>137</sup>

Implicit in the complementarity principle is the contention that, no matter the venue, perpetrators must be held accountable for their crimes. This is made explicit in Article 98 of the Rome Statute, which prohibits states or any other actors from granting suspects immunity.<sup>138</sup> Since states that have ratified the Rome Statute are also legally obligated to uphold its standards, this means that states that have signed the Rome Statute, or states that have an ongoing ICC preliminary examination or investigation, cannot promise amnesty to leaders. Indeed, only the ICC has the ability to revoke an ICC arrest warrant—once an arrest warrant is issued for a leader, no state can nullify the arrest warrant, even if it wants to.<sup>139</sup> This represents a significant potential constraint on negotiators.

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<sup>135</sup> UN General Assembly, *Rome Statute*, p. 19

<sup>136</sup> Nouwen, Sarah MH. *Complementarity in the line of fire: the catalysing effect of the International Criminal Court in Uganda and Sudan*. Cambridge University Press, 2013, p. 2

<sup>137</sup> *Ibid*, p. 8-9

<sup>138</sup> UN General Assembly, *Rome Statute*, p. 75

<sup>139</sup> UN General Assembly, *Rome Statute*, Article 59, Section 4.

In spite of the complementarity principle, the Court still gets involved in the domestic affairs of states. It has escalating modes of involvement: it can open a preliminary examination, open an investigation, issue an indictment for leaders accused of war crimes, bring an apprehended suspect to trial in the Hague, and conduct the trial.

A preliminary examination is the ICC's softest mode of formal involvement. It is initiated by the Prosecutor to gather information to see if a full investigation into a situation is necessary. The Prosecutor will decide to initiate a preliminary examination based on referrals from states, referrals from the UN Security Council or information from individuals, states, IGOs, or NGOs. During this phase, the Court gathers evidence and interviews suspects, victims, and witnesses. Importantly, the Court sends teams of investigators to the country under examination, and to the areas where the crimes were alleged to have occurred, and expects state cooperation in gaining access to necessary areas, people, and resources. The objective is to assess whether there is enough information to show that grave crimes occurred, that the case is within the Rome Statute's jurisdiction, that the case is admissible before the Court, and that it is in the "interests of justice" to open an investigation.

Two factors bear noting here. The first is that complementarity is a major factor in determining a case's admissibility. If there is a legitimate and competent domestic judicial system, the case will likely be deemed inadmissible, as it could be tried domestically. The second is that the requirement that the case be in the "interest of justice" serves to prevent the Court from proceeding with a situation where its



involvement could do more harm than good.<sup>140</sup> This decision is at the discretion of the Prosecutor, and is absolutely crucial.<sup>141</sup>

Practically speaking, the “interests of justice” provision accounts for the fact that the Court simply does not have the capacity to prosecute every potential violator,<sup>142</sup> a fact that is extremely evident upon a simple comparison of the number of culpable leaders enjoying impunity and the number of investigations the Court has opened. It also accounts for the fact that the Court was designed to promote accountability generally, and not international prosecution specifically. Indeed, prosecutorial discretion to only bring a case if it is in the “interests of justice” evidences Prosecutor Moreno-Ocampo’s claim that the Court’s success will be best demonstrated by the lack of international prosecutions, coupled with a rise in domestic accountability.<sup>143</sup>

This means that leaders can use the period of preliminary examinations to demonstrate to the Court that opening a formal investigation—thus going further down the road towards arrest warrants—is not in the “interests of justice.” One of the best ways of doing that is engaging in peace negotiations and making credible, costly attempts to institutionalize post-conflict accountability. The rationale is that if the ICC perceives its involvement to be detrimental to the development of these accountability measures, it will defer further investigation in the “interests of justice.”

If, after conducting a preliminary examination, the Court determines that a situation meets those four requirements, it will open an investigation. It is important to

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<sup>140</sup> “ICC Preliminary Examinations.” Coalition for the International Criminal Court.

<http://www.coalitionfortheicc.org/explore/icc-preliminary-examinations>. Accessed March 25, 2019.

<sup>141</sup> Webb, Philippa. “The ICC Prosecutor’s Discretion Not to Proceed in the Interests of Justice.” *Crim. LQ* 50 (2005): 305.

<sup>142</sup> Brubacher, Matthew R. “Prosecutorial Discretion within the International Criminal Court.” *Journal of International Criminal Justice* 2, no. 1 (2004): 71-95.

<sup>143</sup> Webb, “The ICC Prosecutor’s Discretion Not to Proceed in the Interests of Justice.”

note that the Court first investigates situations where atrocities are believed to have occurred, not cases against specific suspects. If the ICC has gathered sufficient information during an investigation, it will issue indictments for suspected perpetrators. Thus far, the ICC has issued 42 indictments, and 33 of those were followed by arrest warrants.<sup>144</sup> Of these, 9 have appeared before the Court at the Hague, and 4 have been convicted of charges brought by the ICC.<sup>145</sup>

There are several important differences between a preliminary examination, an investigation and an indictment that determine the nature of the Court's involvement in a conflict situation. When the Court has a preliminary examination in a situation involving a civil war or peace negotiation, its formal role in the situation is primarily that of oversight. By this, I mean that the Court functions to remind the conflict parties that an international institution with the capacity to prosecute is monitoring the situation, is assessing not only their history and ongoing actions in the conflict, and is committed to ensuring that any political solution to the conflict includes justice mechanisms. However, if the Court has not opened an investigation or issued an indictment, it does not immediately constrain leaders' exit options, as it is only monitoring the human rights situation.

However, when the Court opens a formal investigation, it begins to collect information to build cases against leaders. At this juncture, it is much more likely to assume a prosecutorial role, as it is operating with the explicit goal of bringing charges against culpable leaders. This distinction is important for how leaders consider their exit options after conflict. It is one thing if the Court is simply gathering information on the

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<sup>144</sup> "International Criminal Court." Coalition for the International Criminal Court.  
<http://www.coalitionfortheicc.org/explore/international-criminal-court> Accessed March 25, 2019.

<sup>145</sup> Ibid.

human rights situation; it is another if it is gathering information on specific instances of human rights violations with an eye towards prosecuting leaders.

When the Court issues arrest warrants for leaders, it is definitively acting as a prosecutor in the conflict situation, and cannot remain in an oversight role. The nature of its relationship with the conflict parties also changes once warrants are issued—instead of only requesting information from conflict parties, the Court also relies on them to cooperate in executing arrest warrants. These obligations apply particularly to states: once a state is party to the Rome Statute, it is legally obligated to cooperate with the Court in both the investigation and the prosecution of crimes.<sup>146</sup> The Court can make formal requests that states cooperate with it in various ways, such as providing documents, providing logistical support for the investigation, or assisting with protecting witness confidentiality. These obligations to cooperate may not significantly onstain state behavior when the ICC is engaged in a preliminary examination or investigation, but state obligations increase once the ICC has issued arrest warrants. Once the Court issues arrest warrants, all states that have ratified the Rome Statute are legally bound to arrest those named and turn them over either to the Court or to their domestic judicial system for prosecution.<sup>147</sup> The ICC does not have its own police force, and particularly relies on state cooperation at this stage.

In practice, this cooperation does not always occur. A banner instance of a state's failure to comply with this Rome Statute obligation occurred in June 2015, when South Africa, a state party to the Rome Statute, allowed Sudanese President Omar al-Bashir, who had been indicted by the Court for genocide, to leave a diplomatic summit without

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<sup>146</sup> UN General Assembly, *Rome Statute*, Article 86, p. 66

<sup>147</sup> UN General Assembly, *Rome Statute*, Article 89, p. 67

being detained.<sup>148</sup> Nonetheless, although states can and do violate this treaty obligation, it still means that once an ICC arrest warrant is issued for a leader, states can always legitimately arrest him, and that his arrest will always have the backing of a major international human rights institution. This is why ICC arrest warrants always remove credible offers of amnesty from the table. Even if the negotiating parties would like to offer amnesty, the fact that only the ICC can remove an arrest warrant, coupled with the fact that it is always legal for someone to be arrested on an outstanding ICC warrant, means that no matter the approach of other actors in peace negotiations, an ICC warrant means that amnesty is no longer a viable exit option for the indicted leader.

## **5.0 The theory**

The ICC has conditional effects on the onset and outcome of peace negotiations because by virtue of its institutional design, the discretion of the ICC Prosecutor, and the actions of the constellation of human rights and peace advocates that coalesce around it, it has the potential to play two different and mutually exclusive roles: prosecutor and overseer. In this dissertation, I argue that when the ICC plays the role of prosecutor, it deters leaders from coming to the negotiating table, or, once they are there, it spoils peace negotiations. On the other hand, when it plays the role of overseer, it compels leaders to come to the table, and, once they are there, acts as a guarantor of the peace process. In the following section, I describe the elements of this theory that apply both to the onset and outcome of peace negotiations. Then, in two subsequent sections, I flesh out how these concepts specifically apply to the onset of peace negotiations, and then how they apply to their outcome.

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<sup>148</sup> Onishi, Norimitsu. "Omar al-Bashir, Leaving South Africa, Eludes Arrest Again." *The New York Times*. June, 15, 2015. <https://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html> Accessed March 25, 2019.

The Court plays an oversight role when it positions itself as a monitor of the human rights situation in the conflict, and an advocate for the indispensability of justice in the peace process. The Court's prosecutorial capacity is crucial to its oversight role, but in playing the oversight role, the Court does not wield the stick of prosecution. However, the Court's latent capacity to prosecute means that leaders must pay attention to the fact that the Court is monitoring the situation, and are compelled to include justice mechanisms in any political solution to the conflict. Further, for the Court to play an oversight role, advocates, external mediators, the people affected by the conflict, and especially culpable leaders must perceive the Court to be monitoring the *entire* conflict situation, closely tracking the human rights record of *both* sides, and pushing the agenda of justice rather than prosecution.

The Court plays a prosecutorial role when it positions itself as the institution that will either put culpable leaders on trial, or make sure that they are tried somewhere. It construes its investigatory work as a function of a prosecutorial mission: it portrays the point of investigation to be gathering evidence to hold culpable leaders to account. Whether the Court plays a prosecutorial role is not completely up to it, however. It is also about how it is perceived by the other actors in the conflict situation. When these actors, including human rights and peace advocates, external mediators, the people most affected by the conflict, and especially potentially culpable leaders, see the Court only as a prosecutorial, rather than justice-promoting, institution, the Court is consigned to play the role of prosecutor.

Whether the Court acts as a prosecutor or an overseer depends on the Court's formal and informal approach, as well as the public stances of the human rights and peace

advocates also working in the conflict situation. When the Court's formal and informal approach emphasize prosecution narrowly, rather than justice broadly, and when advocates publicly contradict the Court's anti-impunity norms, it plays a prosecutorial role. However, when the Court's formal and informal approach emphasize justice broadly, and when advocates publicly reinforce the its anti-impunity norms, the Court plays an oversight role.

By formal approach, I refer to the formal status of the Court's involvement in a conflict situation, or whether the situation is in the preliminary examination, investigation, indictment, or trial stage. When the Court has issued arrest warrants, it is impossible for it to function in any role outside of the role of prosecutor; however, when it is still in the preliminary examination or even the investigation phase of a situation, it is possible for it to play the role of overseer.

By informal approach, I refer to how much the Court's public facing officials, and more than anyone, its Prosecutor, emphasize the specific prosecution of leaders relative to the broad pursuit of justice in their public statements. There are several ways that the Court's public relations style can emphasise a prosecutorial rather than simply a justice-promoting approach. The most basic is that the Court can publicly promise to make good on indictments or arrest warrants issued for certain leaders. The Court can repeatedly and publicly remind states of their Rome Statute obligations to not offer amnesty under any circumstances, and to apprehend and arrest any indicted leaders. Short of that, the Court can also make public statements of its commitment to prosecute and prevent impunity for culpable leaders. The volume of these statements matters: repeated, insistent public reminders of the norms codified in the Rome Statute and the Court's commitment to

pursue them, especially when indictments have been issued, amount to an affirmation of the Court's prosecutorial role.

On the other hand, the Court can maintain an oversight role in its public relations style by making fewer statements, and by emphasizing its commitment to justice broadly, and not only to international prosecution narrowly. Further, the Court can downplay its prosecutorial capacity—and avoid casting itself in the role of prosecutor—by emphasizing the complementarity principle, thus affirming its role in promoting accountability through various means and venues, instead of simply by international prosecution. Lastly, if the Court is still in the preliminary examination phase, it can emphasize its commitment to act in the “interests of justice,” subtly reminding its audiences that although it can mount international prosecutions, it is not consigned to do so, and will decline to pursue prosecutions if it decides that justice can be better pursued by other means.

I also argue that the public positions of human rights and peace advocates condition whether the ICC assumes the role of prosecutor or overseer. In brief, I argue that when advocates contradict the Court, the Court falls into more of a prosecutorial role, but when advocates amplify the Court's normative message, they enable it to play an oversight role. To unpack how this works, we need to understand who these advocates are and why their voices matter.

By human rights or peace advocate, I mean any political organization of any size and scope who is involved in the conflict situation either to promote human rights or make peace. Most typically, these advocates are either domestic and international NGOs fighting for respect for human rights and the rule of law. They can also be states and

international organizations working to bring about a negotiated settlement to the conflict. Although all of these advocates fit into my theory the same way, NGOs are especially important because of their relationships to the Court.

Since literally before its inception, the ICC's relationships with NGOs have been extremely important to its basic functions.<sup>149</sup> NGOs are also absolutely crucial for amplifying the ICC's argument about preventing impunity: according to the convener of the Coalition for the International Criminal Court (CICC), thousands of NGOs have staff dedicated to promoting the ICC's work.<sup>150</sup> Crucially, these NGOs are committed to the norms upon which the Court was founded much more than they are committed to the Court itself; in other words, most NGOs see themselves as promoting the Rome Statute, not the Court.<sup>151</sup> Since NGOs are often not constrained by their relationships to states—whereas the ICC overwhelmingly depends on states for its budget and operating reach—NGOs can afford to be bolder in their public advocacy of these norms.<sup>152</sup> Indeed, NGOs can act as a voice for the Court before the Court itself speaks, thus amplifying the Court's voice while also shielding it from the political ramifications that could have come if the Court had spoken for itself.<sup>153</sup> My argument is that when human rights NGOs do so, they are helping the ICC to assume an oversight role in peace negotiations.

The reason for this is simple, but bears elucidation. When a civil society organization—or indeed, any organization that is not an international court—makes a public statement either railing against impunity or explicitly calling for the prosecution of

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<sup>149</sup> Haddad, Heidi Nichols. "After the norm cascade: NGO mission expansion and the Coalition for the International Criminal Court." *Global Governance: A Review of Multilateralism and International Organizations* 19, no. 2 (2013): 187-206.

<sup>150</sup> Haddad. *The Hidden Hands of Justice*, p. 112

<sup>151</sup> Ibid, p. 121

<sup>152</sup> Ibid, p. 142

<sup>153</sup> Ibid.



culpable leaders, it does not pose the same threat to leaders' exit options as when the Court itself makes that statement. This is simply because no other human rights promoter has the mandate to prosecute any leader, anywhere in the world. As has been previously detailed, when the ICC itself makes such strong anti-impunity statements, it casts itself in the role of prosecutor. However, when another organization makes a strong anti-impunity statement in an situation that the ICC is involved in, that organization cannot cast itself as a prosecutor because it does not have the capacity to prosecute. In brief, non-prosecutorial human rights and peace advocates are better positioned than the Court to remind leaders of the terms of the Rome Statute without simultaneously making them feel threatened by these terms.

Thus, when advocates take up the mantle of strongly advocating against impunity, they are reminding culpable leaders of the ICC's latent capacity to prosecute without actually threatening their exit options. This clears space for the ICC to continue to advocate for justice during the peace process without disincentivizing leaders from participating, and thus allows it to continue to act as an overseer and avoid assuming the role of prosecutor. Further, if advocates promote prosecution while the ICC promotes justice more broadly construed, then leaders will take the task of addressing questions of post-conflict justice more seriously in the peace process because they will be more consistently mindful of the fact that doing so could help them to neutralize the latent threat of ICC prosecution.

However, human rights and peace advocates do not necessarily have to advocate on behalf of the Court or its anti-impunity norms. For one thing, not all countries have the same constellation of human rights NGOs that are equipped to advocate for the Court's

principles and work. One important factor that conditions the role NGOs can play is the previous involvement of regional human rights courts in the country or conflict situation. Regional court systems matter because they can condition the way that both states and civil society organizations are used to interacting with Courts.<sup>154</sup> The existence of a regional court can sensitize states to the practices required to cooperate with courts, and can especially sensitize state leaders to interactions with supranational courts.<sup>155</sup> For example, the IACtHR has more institutional mechanisms to allow NGOs to play a role, which has contributed to the evolution of a strong network of civil society organizations with considerable experience and expertise in international legal institutions and human rights law.<sup>156</sup>

However, in some cases, human rights and peace advocates are not sensitized to the accountability norms that undergird the Rome Statute, or do not know how to best coordinate their advocacy with the Court's work. Indeed, advocates can also be vocally critical of the Court or can publically ask it to reduce its involvement in conflict situations. When human rights or peace advocates publically contradict the Court's normative commitment against impunity, they enhance its role as prosecutor, and its effect as a spoiler, in two ways.

First, statements that publicly call the anti-impunity norm into question can provoke public reaffirmations from the ICC of the need for accountability. These

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<sup>154</sup> Haddad, Heidi Nichols. "Judicial institution builders: NGOs and international human rights courts." *Journal of Human Rights* 11, no. 1 (2012): 126-149.

<sup>155</sup> Hillebrecht, Courtney. "The domestic mechanisms of compliance with international human rights law: Case studies from the Inter-American human rights system." *Hum. Rts. Q.* 34 (2012): 959; Hillebrecht, Courtney. "Implementing international human rights law at home: Domestic politics and the European court of human rights." *Human Rights Review* 13, no. 3 (2012): 279-301; Hillebrecht, Courtney. "The power of human rights tribunals: Compliance with the European Court of Human Rights and domestic policy change." *European Journal of International Relations* 20, no. 4 (2014): 1100-1123.

<sup>156</sup> Haddad, "Judicial institution builders: NGOs and international human rights courts."

reaffirmations can often be the kind of public statements that cast the Court in a prosecutorial role, especially when the Court has issued indictments or arrest warrants. Thus, when advocates' critiques of the Court or its mission prompt it to publicly defend itself, this often results in it backing further into a prosecutorial corner.

Second, and perhaps more importantly, when advocates—especially human rights advocates—question the role and normative commitments of the Court, this can increase leaders' uncertainty about their exit options. Leaders will routinely consult with external actors on peace negotiations, and rebel leaders in particular will often rely on civil society organizations to understand the legal and political issues at play during peace negotiations. When these organizations' statements contradict the Court's, this increases leaders' uncertainty about their exit options. However, these contradictions would not increase leaders' uncertainty about the viability of resuming the fight in hopes of gambling for resurrection. Indeed, they might make it a more attractive option.

A broad sketch of the concepts used in this theoretical framework, and an explanation of why they matter, do not do enough to explain how the ICC can both propel and prevent leaders from making peace, and how the Court can both spoil and guarantee peace negotiations. The following two subsections illustrate how these concepts condition the ICC's role first in the onset of peace negotiations, and then in their outcome.

### **5.1 How the ICC affects the onset of peace negotiations**

If there is a canon of conventional wisdom in the perennial peace-justice debate, it surely includes the notion that rebel leaders, who are already in a position of insecurity relative to their government counterparts, find it difficult to enter peace negotiations in

good faith if there is an imminent threat of prosecution and punishment.<sup>157</sup> This is why advocates of amnesty argue that amnesty is a bedrock of successful peace negotiations.<sup>158</sup>

However, prosecution might not always be a deterrent to formal peace negotiations. Indeed, the empirical evidence shows that while domestic prosecutions might hinder belligerents from coming to the negotiating table, international prosecutions do not always prevent them from coming to the table. Thus, in this section I argue that, depending on the other conditions of the conflict situation, the ICC can either propel actors to or deter them from participation in formal peace negotiations.

Whether the ICC brings actors to or keeps them from the table depends on how the involvement of the ICC affects leaders' calculations of their exit options: if ICC involvement means that leaders have a long-range concerns about prosecution but no immediate fear of arrest, it will incentivize them to come to the table. However, if ICC involvement makes leaders fear arrest, it will deter them from participating in peace negotiations. I argue that when the ICC assumes a prosecutorial role, it deters leaders from coming to the table precisely because they will have immediate fears of arrest, and when the ICC assumes an oversight role, it compels leaders to come to the table in order to neutralize a possible threat of prosecution.

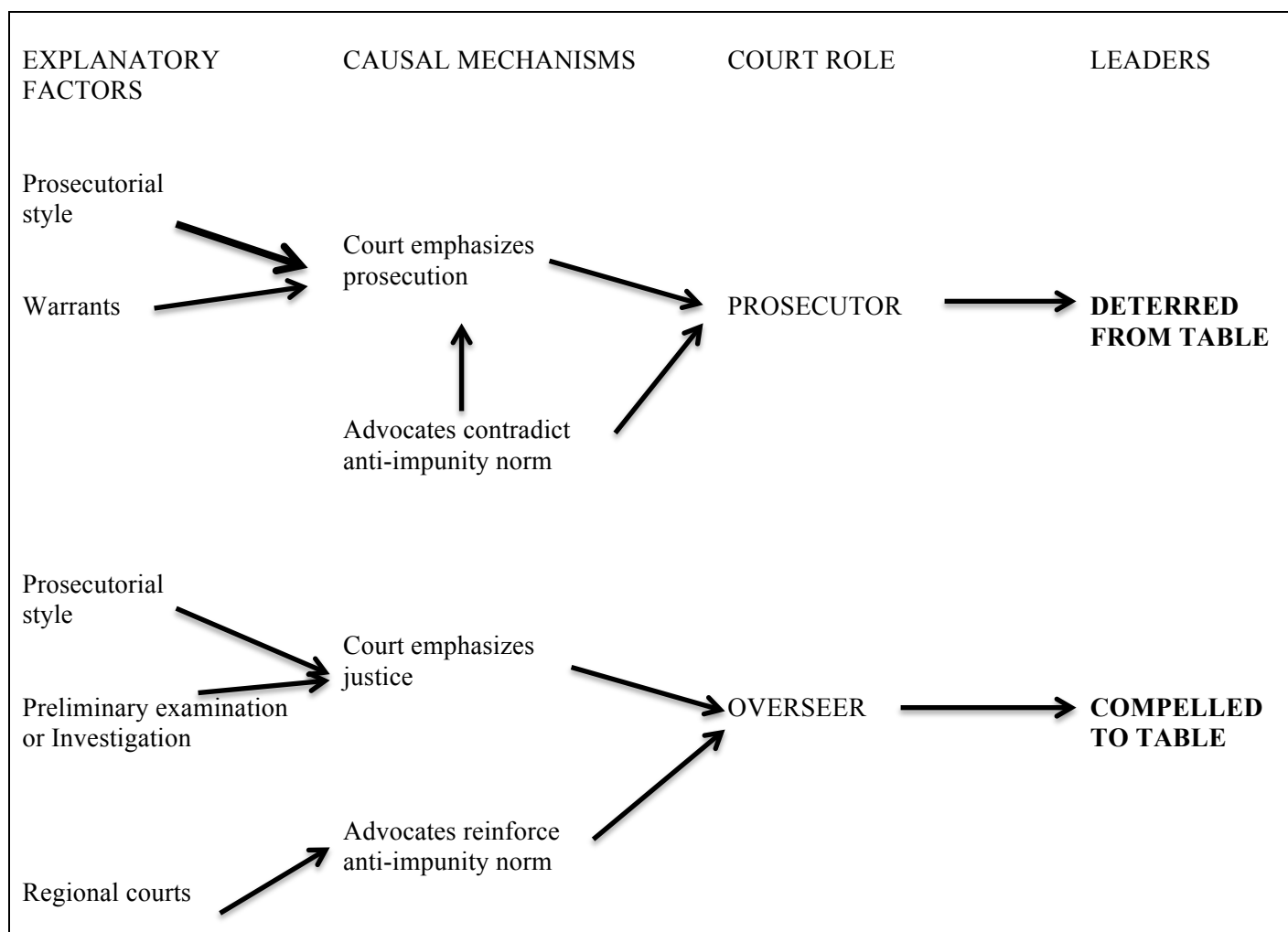
This theory, as well as the set of factors that condition whether the ICC plays a prosecutorial or oversight role, is summarized in the following figure. Then, two subsections flesh out how the ICC assumes a prosecutorial role that deters leaders from the table, and how it assumes an oversight role that compels them to negotiate.

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<sup>157</sup> Ku and Nzelibe. "Do international criminal tribunals deter or exacerbate humanitarian atrocities."; Branch, "Uganda's civil war and the politics of ICC intervention."

<sup>158</sup> Dancy, Geoff. "Deals with the devil? conflict amnesties, civil war, and sustainable peace." *International Organization* 72, no. 2 (2018): 387-421.

Figure 2.5.1. How the ICC affects the onset of peace negotiations



### 5.1.1 How the ICC prevents peace negotiation onset

When the ICC plays a prosecutorial role in a conflict situation, it can stop peace before it even begins. When there is an ICC indictment or arrest warrant for leaders, the threat of immediate threat of arrest can override whatever incentives leaders might have to come to the table to negotiate peace. If leaders do not believe that they can use peace negotiations to create more favorable exit options, they will not engage in peace negotiations. Then, it is obvious that if leaders believe that engaging peace negotiations

will lead to their prosecution in an international court—a very suboptimal exit option—they certainly will not engage.

Whether the ICC serves as a deterrent to leaders arriving at the table largely depends on whether the ICC plays the role of prosecutor. If the ICC has issued arrest warrants for rebel leaders, it inevitably plays the role of prosecutor. However, the ICC can also cast itself in the role of prosecutor through its public stances. If it casts itself principally as a prosecutor, and less as a promoter of justice, broadly construed, and signals that it is unwilling to compromise on the indictment, arrest, and international prosecution of leaders, this diminishes leaders' potential to use engagement in peace negotiations to create better exit options for themselves.

The public stances of human rights and peace advocates also condition whether the ICC deters leaders from coming to the negotiating table. When advocates publicly contradict the ICC, and especially when they contradict the Rome Statute's anti-impunity norms, they can deter leaders from coming to peace negotiations by prompting the ICC to further assume the role of prosecutor, and by increasing leaders' uncertainty about how the ICC will affect their exit options. Further, these mechanisms can be interrelated: if the ICC reaffirms its commitment to prosecute even in the face of criticism or contradiction from human rights and peace advocates, this shows leaders that any efforts they make to create a peace agreement with post-conflict justice provisions might not help them secure good exit options because the ICC seems determined to prosecute them regardless.

An important subset of this outcome is that an ICC investigation or indictment might incentivize leaders to participate in negotiations from a distance while sending varyingly equipped and intentioned representatives to appear at the table on their behalf.

While in some sense this represents participation in negotiations, when leaders are not in effective communication with their representatives, it can effectively constitute a failure to arrive at the table.

### **5.1.2 How the ICC promotes peace negotiation onset**

This mechanism is founded on the contention that when ICC involvement in a conflict situation makes leaders fear the long-range prospect of international prosecution, but does not make them immediately fear arrest, they will be more likely to participate in peace negotiations. This logic seems counterintuitive—how can someone fear prosecution without fearing arrest?

Part of the answer lies in the nature of the ICC, and in its escalating modes of involvement in a conflict situation, and part of the answer lies in how the ICC can choose to shape its own role in a conflict situation. Recall that the ICC can be involved in a conflict situation in several ways: it can have a preliminary examination to determine if a situation meets the criteria for a formal investigation, it can open a formal investigation to assess whether it can charge leaders with crimes, it can issue indictments of leaders for crimes, and it can bring leaders to trial. All of these different levels of involvement constitute escalating threats of prosecution. Recall also that, due to the principle of complementarity, there is only one surefire way for leaders to avoid international prosecution: designing a competent and legitimate domestic justice system to whose jurisdiction the ICC will defer. Recall finally that the Rome Statute gives the ICC Prosecutor the discretion to not escalate its involvement in a conflict situation if the Prosecutor determines that it is not in the “interests of justice” to do so.

Therefore, when the ICC is involved in a preliminary examination of a situation, leaders are sensitized to the possibility of international prosecution, but international prosecution is not an imminent threat. Leaders have two clear pathways to remove the possible threat of prosecution: the principles of complementarity and the Prosecutor's discretion on the "interests of justice." Even at this stage of ICC involvement, leaders have incentives to take measures to prevent the initiation of a formal ICC investigation which could result in the issuance of arrest warrants. One way for leaders to stave off a formal ICC investigation is to show that they are working toward resolving the conflict and ceasing hostilities.

The material differences between preliminary examinations and investigations matter here. During a preliminary examination, the Court does not have full investigatory powers, and the scope of the investigation is only meant to determine whether a case can be brought before the Court.<sup>159</sup> This is good news for leaders, because during the preliminary examination phase, leaders can use their involvement in peace negotiations to show the Court that it might not be in the "interests of justice" to mount a full investigation into specific individuals, thus ensuring that the Court's focus remains on the conflict broadly rather than on them specifically.

State leaders have a particular incentive to prevent the escalation of an ICC preliminary examination, as an ICC investigation might be perceived to bring with it reputational costs: the club of states under ongoing ICC investigation is not a club of which most states want to be a member. Indeed, while all leaders have incentives to ensure that the ICC's involvement in a situation does not escalate beyond a preliminary

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<sup>159</sup> Office of the Prosecutor of the International Criminal Court. "Policy Paper on Preliminary Examinations." *International Criminal Court*. November 2013. [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf) Accessed March 25, 2019.



examination due to concerns about their own exit options, state leaders also might have enhanced incentives to protect their state's international reputation.

Rebel leaders also have a distinct incentive to come to the table when the ICC is involved in a conflict situation. When the ICC is involved, rebel leaders are assured that an international institution is overseeing the negotiations, which can serve as a check to the state. This is especially important for rebel leaders, who fear that once they demobilize, the state can renege on any promises regarding their post-conflict fates. The involvement of an international institution, and especially an international institution that promotes human rights and has the mandate to prosecute culpable state leaders, makes it more difficult for the state to do this, thus providing assurances to rebel leaders.<sup>160</sup>

Thus, when the ICC has a preliminary examination in a state, this creates a clear incentive for leaders to come to the negotiating table. Appearing to make progress in resolving the conflict and halting hostilities can signal to the Court, and to the international community, that the actors are committed to getting their proverbial houses in order and to improving the human rights situation.

However, the Court's formal mode of involvement is not the only aspect of its role that affects leaders' decisions to come to the table. If the Court emphasizes that its objectives are to promote justice in the conflict situation, and if it has a chorus of advocates echoing its normative commitment to do so, this further incentivizes leaders to come to the negotiating table. These advocates' statements serve to remind leaders that they can use involvement in peace negotiations to neutralize the latent threat of prosecution that the ICC poses, whereas if the Court itself made these statements, it would cast itself more in the role of prosecutor. Still, it is Court's involvement in the

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<sup>160</sup> Daniels, "The International Criminal Court and the Rebels' Commitment Problem."

situation that makes these statements matter to leaders, as they remind leaders that engaging in peace negotiations and taking the question of justice seriously throughout can help them avoid international prosecution.

When the ICC has a formal investigation or indictments, this can also incentivize leaders to come to the negotiating table, but due to the escalated threat of prosecution that these stages represent, a set of additional conditions can determine whether an ICC investigation or indictment will compel leaders to come to the table or keep them away from it. Particularly important is how the ICC frames its role in the situation: if its public relations style emphasizes its commitment to justice, and leaves open the possibility that justice includes outcomes where culpable leaders are not prosecuted in the Hague, ICC involvement can incentivize leaders to come to the negotiating table even if its formal role in the situation is closer to prosecution.

A caveat is in order here. I assume that a formal ICC investigation amounts to a significant threat of prosecution—a much more escalated threat than a preliminary examination represents—because the ICC can move from a formal investigation to issuing an indictment quite quickly. The Libyan case is an instructive example. In response to a referral from the UN Security Council on February 26, 2011,<sup>161</sup> the ICC opened a formal investigation into the Libya situation on March 2, 2011.<sup>162</sup> On May 16, 2011, the ICC issued arrest warrants for three Libyan leaders, including Muammar al Gaddafi, the president.<sup>163</sup> Thus, in the space of two and a half months, the ICC opened an

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<sup>161</sup> “Situation in Libya.” *International Criminal Court*. <https://www.icc-cpi.int/libya> Accessed March 25, 2019.

<sup>162</sup> Office of the Prosecutor of the International Criminal Court. “ICC Prosecutor to Open an Investigation in Libya.” February 3, 2011. <https://www.icc-cpi.int/pages/item.aspx?name=statement+020311> Accessed March 25, 2019.

<sup>163</sup> “Gaddafi Case.” *International Criminal Court*. <https://www.icc-cpi.int/libya/gaddafi/> Accessed March 25, 2019.

investigation and issued arrest warrants, showing that the opening of a formal ICC investigation can represent a fairly immediate threat of arrest for leaders.

Since a formal investigation or indictment can represent a fairly immediate threat of arrest, it is important to outline the conditions under which they can compel leaders to come to the negotiating table, rather than deterring them from arriving to it for fear of arrest. Again, part of the explanation here rests on the notion of complementarity, which can explain why international prosecution promotes participation in peace negotiations in a way that domestic prosecution does not. Once the ICC issues an arrest warrant, the only way that leaders can be assured that the ICC will drop the warrant is if their case is brought to a domestic justice system whose legitimacy and competence the ICC will accept. Indeed, if an ICC arrest warrant is issued for a leader, every state signatory to the Rome Statute is legally obligated to act on that warrant, which significantly lowers the indicted leader's chances of safe exile in a third country once the conflict has ended.<sup>164</sup> Further, even if the state does offer amnesty to the indicted leader, it will be reneging on its Rome Statute commitments, will likely face censure from the international community for doing so, and will certainly always have the legal option to renege on this promise of amnesty.

Peace negotiations represent an important opportunity for leaders to shape the post-conflict justice system that could serve as the only legally viable alternative to ICC prosecution. Indeed, a crucial function of civil war peace negotiations is to begin to create new post-conflict government institutions, and an ICC investigation or indictment gives leaders a particularly heightened interest in shaping post-conflict judicial institutions. Therefore, in some cases, when the ICC opens an investigation or issues an arrest

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<sup>164</sup> Krcmaric, "Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice."

warrant, peace negotiations become a much more attractive exit option for leaders because they give them an opportunity to pursue a post-conflict future that does not involve standing trial at the Hague by shaping post-conflict domestic justice institutions in which they would be less likely to face punishment.

Still, there are a few conditions that must apply for an ICC investigation or indictment to encourage leaders to come to the negotiating table in hopes of avoiding international prosecution. First, leaders need to understand the principle of complementarity, which presupposes a fairly sophisticated understanding of the Rome Statute and of how the ICC works.<sup>165</sup> Leaders who understand the Court will also understand that the Court does not have the means to prosecute or even exert significant pressure on every human rights situation, and they will take the Court's political and material constraints into account in their approach to peace negotiations.<sup>166</sup> They will also understand that the Court endows the Prosecutor with considerable discretion, which means that the Rome Statute is not consistently or universally applied.<sup>167</sup>

A key conditioning factor here is whether leaders believe the ICC's role to be inevitably that of prosecutor, or whether they think they can dissuade it from playing the role of prosecutor and instead engage with it as an advocate for justice. When the ICC,

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<sup>165</sup> There is ample evidence to support the assumption that most leaders, even rebel leaders, will understand these principles, especially once the ICC becomes involved in their conflict situation. In her book *Compliant Rebels*, Hyeran Jo shows that rebel as well as state leaders can have highly sophisticated understandings of international human rights law and its enforcement mechanisms. Jo shows that rebel groups that desire international legitimacy will develop complex understandings of international laws and norms surrounding prisoner detention, soldier recruitment, and treatment of civilians. Further, she shows that they will deploy these understandings in highly strategic ways to shape perceptions among the international community and even gain concessions from international organizations, civil society, and external states.

<sup>166</sup> Schiff, Benjamin N. *Building the international criminal court*. Cambridge University Press, 2008.

<sup>167</sup> Danner, Allison Marston. "Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court." *American Journal of International Law* 97, no. 3 (2003): 510-552; Goldston, James A. "More candour about criteria: the exercise of discretion by the Prosecutor of the International Criminal Court." *Journal of International Criminal Justice* 8, no. 2 (2010): 383-406.

especially through its public signalling, casts itself in the role of overseer, and its signals convey a broad commitment to ensuring justice, rather than a narrow commitment to prosecution, then leaders will see an opportunity to use the peace process to neutralize any potential threat of ICC prosecution. When the Court emphasizes its broad commitment to justice, it leaves leaders room to consider peace negotiations an opportunity to negotiate what that justice would look like, especially regarding their post-conflict exit fates.<sup>168</sup>

Based on this understanding, informed leaders who are under investigation or indictment by the ICC but who see the ICC more as an overseer than a prosecutor, far from being driven away from peace negotiations out of fear of arrest, are in fact incentivized to join peace negotiations in hopes of shaping a more favorable, and equally legal and legitimate, alternative to international prosecution.

## **5.2 How the ICC affects the outcome of peace negotiations**

Once negotiations are underway, the ICC's involvement in a conflict situation significantly affects both rebel and state leaders' calculations of their exit options, and of the political situation more broadly. Even when leaders engage in peace negotiations, the threat of the escalation of a preliminary examination into an investigation, an investigation into an indictment, or an ICC arrest warrant do not disappear. Thus, at this phase of the peace process, the ICC also affects the outcome of peace negotiations largely in how it changes leaders' calculations surrounding their own exit options.

In particular, ICC involvement at this phase of peacemaking might significantly constrain what leaders can offer to their counterparts as incentives to make peace. The ICC was founded based on a normative commitment to prevent impunity after atrocity, so

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<sup>168</sup> Rodman, Kenneth A. "Is peace in the interests of justice? The case for broad prosecutorial discretion at the International Criminal Court." *Leiden Journal of International Law* 22, no. 1 (2009): 99-126.

whatever its level of involvement in a situation, it can and will work against leaders who seek to promise impunity to their counterparts as an incentive to negotiate, or who use negotiations to advocate for themselves. Then, once an arrest warrant has been issued, unconditional amnesty is not a legally viable option, and any promise of amnesty during negotiations can significantly damage the state's credibility.

Indeed, the central mechanism by which the ICC affects leaders' calculations of their exit options during this phase is predicated on the fact that its involvement complicates offers of amnesty, a key incentive for leaders to make peace. This affects leaders' exit options, but it also conditions leaders' trust in their negotiating counterparts, and their perceptions of each other's credibility. However, ICC involvement can also enhance leaders' trust in the negotiating process, as the ICC can function as an external monitor of the peace process, and as one that is specifically committed to preventing human rights violations. Therefore, in some situations, the ICC's commitment to preventing impunity can serve to enhance leaders' investment in the negotiating process, as they know they have a monitoring organization that is invested in holding their opponents accountable for any post-ratification violence.

The ICC's commitment to preventing amnesty and impunity should be uniform across all the situations in which it is involved. In reality, however, this is not the case, partially because the Court's limited material capacity forces it to make political decisions about where to pursue prosecution.<sup>169</sup> Its public conveyance of this anti-

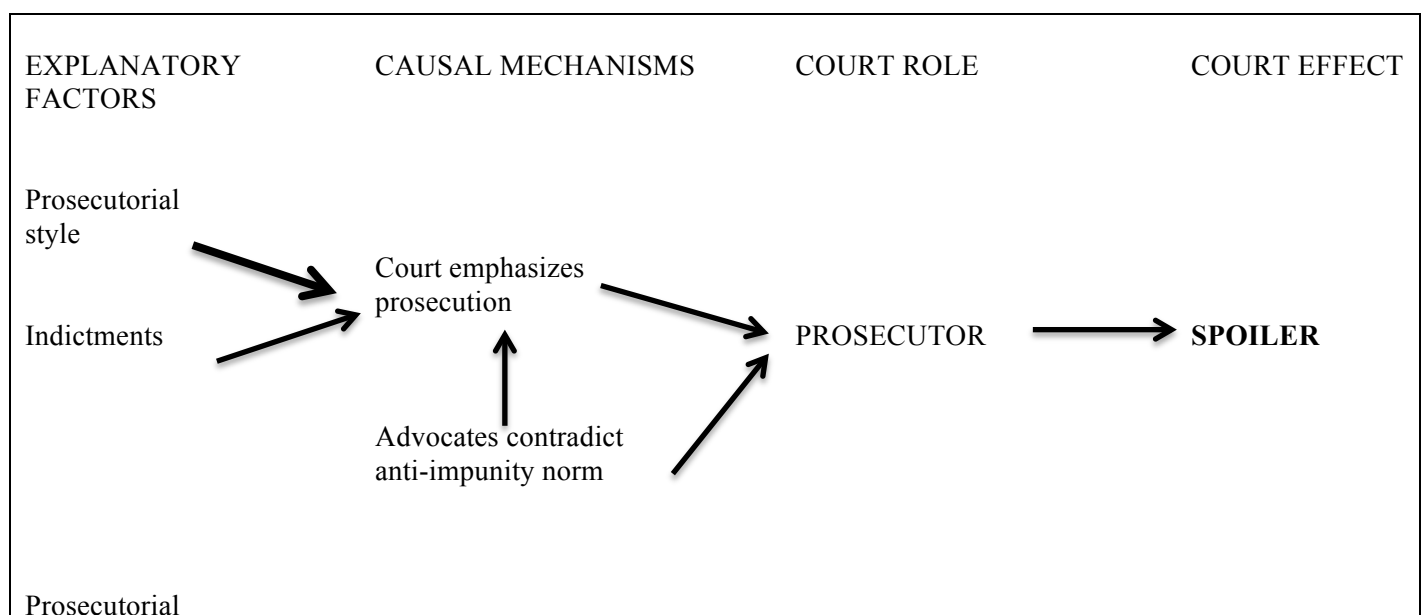
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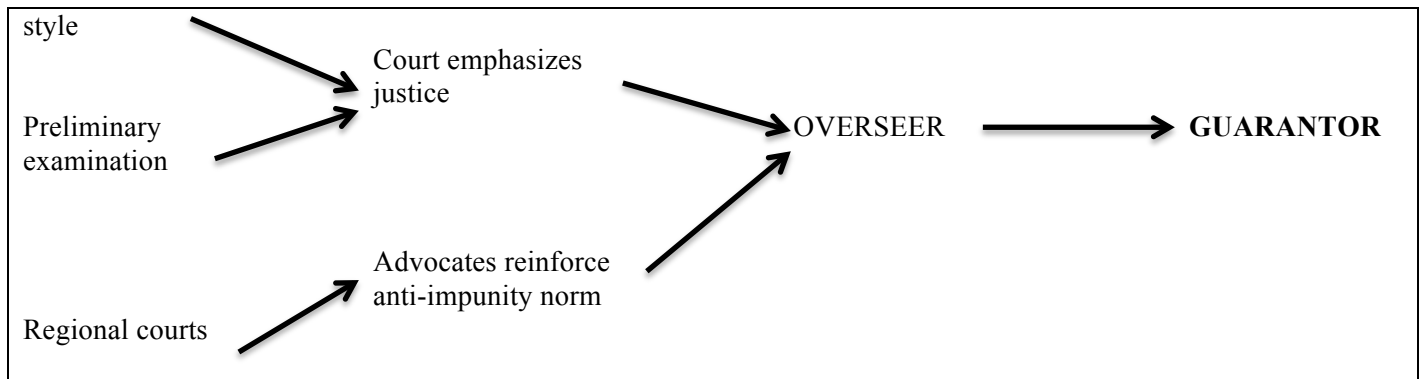
<sup>169</sup> Brubacher, Matthew R. "Prosecutorial Discretion within the International Criminal Court." *Journal of International Criminal Justice* 2, no. 1 (2004): 71-95; Schabas, William A. "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court." *Journal of international criminal justice* 6, no. 4 (2008): 731-761; Davis, Cale. "Political Considerations in Prosecutorial Discretion at the International Criminal Court." *International Criminal Law Review* 15, no. 1 (2015): 170-189.

impunity commitment, correspondingly, is not always uniform. When the Court construes its commitment as to justice, rather than to prosecution, it better positions itself to play an oversight role and thus be a guarantor of peace negotiations. When human rights and peace advocates amplify the Court's normative commitment against impunity, they enable it to emphasize justice over prosecution. However, when advocates contradict the norms of the Rome Statue, they can prompt the Court to reaffirm its commitment to end impunity, and thus prompt it to play a more prosecutorial role.

Depending on the relative balance between these conditions, the ICC can alternately act as a guarantor or as a spoiler of the peace process. If the ICC plays the role of overseer, it can enhance leaders' trust in the peace process, and thus act as a guarantor. However, if the ICC assumes the role of prosecutor, and thus makes indispensable leaders fear imminent prosecution, it damages prospects for peace by incentivizing those leaders to stay away from the table. These two pathways are summarized in the following chart, and are then further detailed in two subsections.

Figure 2.5.2. How the ICC affects the outcome of peace negotiations





### 5.2.1. How the ICC spoils peace negotiations

There are a few key conditions under which ICC plays the role of prosecutor and thus spoils peace negotiations. The first is when a situation is under investigation or especially when indictments have been issued for rebel leaders who are key stakeholders in the peace process. The second is when the ICC emphasizes prosecution narrowly over justice broadly in its public statements. When the ICC does so, it risks spoiling peace negotiations because an ICC investigation coupled with signals of the ICC's commitment to prosecution reminds leaders that, if the ICC issues arrests warrants for them, they cannot legally be offered amnesty and therefore cannot be guaranteed a post-conflict fate that does not involve prosecution at the ICC.

Amnesty can be a key building block of good faith and an important costly signal of intent for peace negotiations. ICC indictments—or frequent reminders of the possibility of indictments—lessen the effectiveness of amnesty, and change leaders' calculus about their exit options. Further, if the ICC signals that the domestic court system is not capable of carrying out a trial that the ICC would accept as legitimate, it further reduces leaders' perceptions of their exit options. If leaders calculate that they cannot expect amnesty, or a fair domestic trial that the ICC would accept as an alternative



to international prosecution, withdrawing from peace talks to resume the fight in hopes of victory might seem to be a more viable exit option.

The ICC's signals of a commitment to prosecution can be especially detrimental to peace negotiations when they contradict the signals of other key actors in the process. For instance, if a state government offers rebels amnesty in spite of ICC's threats or issuance of arrest warrants, or especially their repeated signals pursuant to those warrants, the state damages its own credibility in negotiations, as once an ICC warrant is issued, the state can always legally apprehend the leader on the basis of the ICC warrant. Thus, the state is making a promise it cannot keep, which will call into question all other offers it makes—this stands, no matter the perceived intentions behind the offer of amnesty. In this case, rebels might lose faith either in the state's commitment to and understanding of its prior treaty obligations, or in the state's commitment to simply not double-cross them.

Further, when ICC signals contradict the public statements of civil society actors invested in post-conflict justice outcomes, this increases leaders' uncertainty about their own exit options. However, these contradictory signals would not increase leaders' uncertainty about the viability of gambling for resurrection. Therefore, increased uncertainty about the likelihood of international justice could make resuming the fight a more attractive option.

### **5.2.2 How the ICC guarantees peace negotiations**

The ICC be a guarantor of peace negotiations by playing an oversight role. It can signal its commitment to preventing impunity by advocating for justice broadly rather than international prosecution specifically, so that leaders do not fear their own prosecution; in other words, the way the ICC signals its commitment to ending impunity

can enhance leaders' faith that they can use negotiations to improve their exit options. Further, playing an oversight role also situates the ICC as a guarantor of respect for human rights and a barrier against state excesses post-conflict, which especially enhances rebel leaders' faith that engaging in peace negotiations does not necessarily threaten their post-conflict exit options.

The ICC can act as a guarantor in situations when an indictment has not yet been issued, but in which the ICC is conducting a preliminary examination, or even perhaps an investigation. In this case, leaders' desire to avoid prosecution at The Hague can help the ICC serve as a guarantor of the peace process. Leaders will be committed to the peace process because it can help them shape a set of domestic judiciary institutions that they can use to avoid trial at The Hague and maximize their chances of avoiding punishment at home as well. Further, if ICC involvement is still in the preliminary examination stage, leaders can use peace negotiations to show the ICC Prosecutor that it would not be in the "interests of justice" to open a formal investigation.

The ICC's public stances are also crucial determinants of whether it can act as guarantor in peace negotiations. When the ICC emphasizes its commitment to justice broadly over its capacity to prosecute, this reaffirms to leaders that, drawing on the principle of complementarity or on prosecutorial discretion on the "interests of justice," they can use the peace process to convince the Court that domestic accountability mechanisms would be preferable to international prosecution. Consistent ICC emphasis on justice over prosecution also enhances its role as a guarantor because it reminds leaders that they need to take the role of justice seriously in any peace agreement they

sign, which can help promote credible commitments on post-conflict justice that mitigate leaders' fears about their post-conflict fates after the peace agreement is signed.

The ICC's role as a guarantor in peace negotiations is contingent on human rights and peace advocates' public support for the Rome Statute's anti-impunity norms. This support is absolutely crucial because it reminds leaders of the implications of ICC involvement in the situation—that the ICC has the capacity to prosecute culpable leaders, and if leaders do not take questions of post-conflict justice seriously in peace negotiations, they run the risk of the ICC escalating its involvement. When the ICC itself reminds leaders of these realities, it casts itself in a prosecutorial role. However, since other human rights advocates do not have the capacity to prosecute culpable leaders, when their public statements remind leaders of these realities, they allow the ICC to continue playing an oversight role, while also reminding leaders of their incentives use the peace process to neutralize the latent threat of ICC prosecution.

## **6.0 The alternative explanation**

An important potential alternative explanation for the role of the ICC in civil war peace processes is that the ICC does not play a significant role at all. Indeed, it is possible that whatever relevance the ICC appears to have is actually epiphenomenal, and that it is not the ICC itself that has the effects articulated above, but the constellation of other actors that mobilize around it, such as domestic and regional courts, NGOs, other international institutions, and states. Others argue that when the Court appears to matter, it is actually due to the influence of powerful states, and not the Court as an actor in and of itself.<sup>170</sup>

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<sup>170</sup> Goldsmith, Jack, and Stephen D. Krasner. "The limits of idealism." *Daedalus* 132, no. 1 (2003): 47-63.

To evaluate the extent to which the Court's role is epiphenomenal—that is, whether it is the constellation of actors that might coalesce around the Court, instead of the Court itself that matters—we should consider a situation where the Court was absent, but these actors still behaved the same way. In other words, if the Court is epiphenomenal, in situations where the same constellation of human rights and peace advocates campaign vociferously against impunity and call for culpable leaders to be held accountable, even in the absence of the Court, we should still see successful peace negotiations with justice as an important item on the agenda. My theory argues that the presence of the Court in a conflict situation makes this advocacy matter the way it does; however, if the alternative explanation that the ICC is epiphenomenal holds, this advocacy should matter regardless of ICC involvement.

## **7.0 Conclusion**

This chapter set out a theoretical explanation for previous empirical findings that the ICC has both spoiled and promoted the success of peace negotiations. I account for this discrepancy by theorizing that the way that the ICC affects peace processes depends on the role that it plays: when it plays the role of overseer, it promotes successful peace processes, and when it plays the role of prosecutor, it makes peace processes more likely to fail.

When the ICC plays an oversight role, its involvement in the conflict situation can promote the onset of peace negotiations by propelling leaders to the negotiating table. When leaders believe that they can use peace negotiations to shape better post-conflict exit options, they will come to the table. If the ICC is involved in a conflict as an overseer, it can make leaders more likely to see peace negotiations as an opportunity to

improve their post-conflict fates because they will see peace negotiations as an opportunity to neutralize the latent threat of ICC prosecution, and will also see the potential of the ICC to enhance their opponents' credible commitments on post-conflict justice. When the ICC plays the role of prosecutor, ICC involvement will deter leaders from coming to the negotiating table when they believe that coming to the table constitutes too great a risk of arrest and international prosecution, and therefore that their exit options are better if they continue the fight.

Once peace negotiations are underway, the ICC can also assume the role of an overseer or a prosecutor, which determines whether it functions as a guarantor or a spoiler. When a situation has a strong, united coalition of domestic civil society actors that remind belligerents of their Rome Statute obligations, the Court can effectively assume the role of overseer, because it can rely on other actors to consistently convey and reinforce its message. However, when the constellation of civil society actors does not consistently reinforce the norms of the Rome Statute, or even contradicts the Court's stance on impunity, the ICC's involvement will increase belligerents' uncertainty about their post-conflict fates. In such situations, the ICC acts as a spoiler of peace negotiations. By presenting a real threat of arrest and trial, it gives leaders more reason to fear their post-conflict exit options, and when its signals contradict those of other human rights proponents, it gives leaders more reason to be uncertain about their post-conflict exit options.

The next chapter of this dissertation uses a quantitative analysis of 367 peace mediations from 1989-2010 to illustrate that there is a systematic, empirical trend of peace negotiations involving international prosecution either ending in full settlements, or

with no settlement at all. The following three chapters illustrate the causal mechanisms undergirding this finding, as articulated in this chapter, through three qualitative case studies of peace negotiations in Colombia, Uganda, and Sri Lanka. In Colombia, the ICC assumed the role of overseer, which propelled actors to the negotiating table and helped it act as a guarantor of the 2016 peace agreement. The ICC functioned as a guarantor of the peace process because it provided assurance—in concert with civil society actors—that, in keeping with the norms of the Rome Statute, post-conflict justice would not be a tool that the state used to punish rebels.

In Uganda, the ICC first acted as an overseer, and therefore its investigation helped propel the LRA to participate in peace negotiations with the Ugandan government. However, the ICC then issued indictments and took an increasingly prosecutorial stance. It then stopped functioning as an overseer and began functioning as a prosecutor. I argue that the ICC's role as a prosecutor kept LRA leaders from participating in the peace negotiations that were already underway, and constrained their perception of their post-conflict exit options so much that it significantly contributed to their decision to abandon peace negotiations and resume the fight. Thus, when the ICC assumed a prosecutorial role, it became a spoiler, and was one of several reasons that Uganda and the LRA failed to reach a peace agreement.

Finally, I use the case of Sri Lanka as a counterfactual to evaluate the alternative explanation that the ICC is epiphenomenal. The Sri Lankan conflict saw the involvement of all of the actors that typically interact with or magnify the work of the ICC: powerful external states, major human rights NGOs, a robust domestic civil society, and several intergovernmental organizations, including the UN. However, the ICC was not involved

in the conflict between the LTTE and the government of Sri Lanka. Many other international human rights organizations were involved, and sent strong signals on international efforts towards post conflict justice. Numerous human rights promoters—including the UN and major NGOs—advocated for post-conflict accountability, including by calling for the prosecution of culpable leaders. However, with no international court to back them up, these advocates did not affect belligerents' decision to arrive at the table, or their conduct while they were there. Therefore, I use this case to show that the ICC's function in peace processes is distinct from other international proponents of human rights, because the Court in and of itself carries the threat of international prosecution, and in the absence of the Court's involvement, other actors' calls for accountability cannot matter in the same way.

Chapter 3 contains a quantitative analysis of 367 peace negotiations that occurred from 1989 to 2010. The findings of this chapter provide additional empirical justification for the ICC's conditional effects in conflict: in brief, this analysis shows that the involvement of an international criminal tribunal makes both complete failure of peace talks and the creation of a comprehensive peace agreement more likely than a partial agreement. This upholds this chapter's theoretical contention that the ICC can function alternately to spoil and guarantee peace negotiations, and shows that the theorizing here, as well as the findings of the qualitative cases, may be generalizable beyond a few cases of ICC involvement.

## CHAPTER 3 | THE DUAL EFFECT OF INTERNATIONAL PROSECUTION

### 1.0 Introduction

In this dissertation, I argue that the ICC has a conditional effect on peace negotiations: in different situations, it can act both as a spoiler and as a guarantor of peace negotiations. There is already empirical evidence demonstrating international tribunals' conditional effect on conflict termination, but there is no systematic quantitative analysis of the ICC's effect on peace negotiations. This chapter fills that gap, provides an empirical justification for the necessity of a theory explaining the ICC's conditional effects, and thus sets the empirical stage for the three subsequent qualitative case studies.

Although the ICC's effect on peace negotiations specifically has not yet been assessed through large-N quantitative analysis, there are several such studies examining how international criminal tribunals or international prosecution affect conflict termination broadly. These studies also find that the specter of international prosecution has conditional effects on how conflicts end. Krcmaric finds that the prospect of international prosecution takes away the exile option for culpable leaders, which in terms of anti-impunity norm promotion might be a positive step, but which empirically means that these culpable leaders become more likely to stay in the conflict and fight.<sup>171</sup> Prorok corroborates these findings,<sup>172</sup> and in another study also finds that the specter of international prosecution prolongs conflict, but that this effect diminishes slightly when there is a credible domestic mechanism for prosecuting culpable leaders.<sup>173</sup>

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<sup>171</sup> Krcmaric, "Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice."

<sup>172</sup> Prorok, "Leader incentives and civil war outcomes."

<sup>173</sup> Prorok, "The (In) compatibility of peace and justice? The International Criminal Court and civil conflict termination."



Some studies, have, however, focused on how the involvement of an international criminal tribunal specifically affects attempts to negotiate peace agreements to end civil wars. All of the current empirical work on this focuses on single cases of ICC involvement in peace negotiations, so there is no systematic evidence of the theorized dual effect on peace negotiations. Still, these single case studies yield such different findings that they point the way towards the conclusion that the ICC has a conditional effect. Some of these studies argue that the ICC spoils peace negotiations. In a seminal 2007 paper on ICC involvement in the Juba Peace Process in Uganda, Adam Branch argues that the Ugandan government “politically instrumentalized” the ICC in the civil conflict, and moreover that the ICC allowed itself to become the government’s political instrument, which effectively prolonged the conflict and raised the costs for the rebels of coming to the negotiating table.<sup>174</sup> A much more recent 2018 analysis of the ICC’s involvement in the Colombian peace process argues that, counter to conventional wisdom, the ICC can and did act as a guarantor of peace because it reduced the rebels’ credible commitment problem by providing oversight that can act as a check against potential state human rights abuses.<sup>175</sup>

Therefore, the current literature points the way towards what I found in this chapter: when international prosecution is a factor in a peace mediation, the peace mediation becomes both more likely to either completely fail, or to end in a comprehensive peace agreement. To get to that finding, I specified several logistic regression models on a dataset of the outcomes of 367 civil war peace mediations. I compared the effects of four kinds of justice mechanisms: international prosecution,

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<sup>174</sup> Branch, "Uganda's civil war and the politics of ICC intervention."

<sup>175</sup> Daniels, "The International Criminal Court and the Rebels’ Commitment Problem."

international non-prosecution, domestic prosecution, and domestic non- prosecution.

International prosecution was the only justice mechanism that has a conditional effect on the outcome of peace negotiations, and made both the collapse of negotiations and the creation of a comprehensive peace agreement more likely. This conforms to quantitative studies' previous findings on how international criminal tribunals affect civil war termination, and qualitative findings on how the ICC affects the resolution of civil wars.

This chapter's findings on the effects of domestic prosecution, domestic non-prosecution, and international non-prosecution also conform with previous findings in the transitional justice literature. The results show that domestic prosecutions and domestic non-prosecutions make the failure of peace negotiations more likely, while international non-prosecutions make peace negotiations more likely to succeed. These findings are summarized in the following table.

Figure 3.1.1. Summary of findings

Scope of institution mounting justice mechanism			
Justice mechanism type		INTERNATIONAL	DOMESTIC
	PROSECUTORIAL	<b>Conditional</b> Promotes complete failure of peace negotiation or promotes comprehensive peace agreement	<b>Negative</b> Promotes peace negotiation failure and weaker peace agreements
	NONPROSECUTORIAL	<b>Positive</b> Promotes better peace negotiation outcomes and more comprehensive peace agreements	<b>Negative</b> Promotes peace negotiation failure and weaker peace agreements.

This chapter proceeds in the following parts. The first section details how I created the dataset used in this analysis. The second section details the operationalization of the dependent variables, independent variables, and control variables. The third section details the quantitative method used, and explains the models I specified and why I specified them. The fourth section presents the results of the analysis. The fifth section analyzes the results, contextualizes them in terms of the current literature, and explains what they mean for this dissertation. The sixth section concludes and points the way for the next three empirical chapters.

## **2.0 The dataset**

The unit of analysis of these data is attempts at peace mediations for civil wars. The list of cases is drawn from the Civil War Mediation Dataset, which in turn draws from the UCDP Armed Conflict Termination Dataset, and therefore employs the UCDP/PRIO definition of civil war:

a contested incompatibility that concerns government or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths.<sup>176</sup>

The Civil War Mediation dataset has a key limitation: it only comprises conflicts in which territory is the main contested issue. All of the conflicts in the dataset are wars of secession or autonomy, and the conclusion drawn from it may not be generalizable to other kinds of conflicts.

The Civil War Mediation dataset specifically covers mediation attempts, which means that it only comprises attempts at peace negotiations that included an actor besides the rebel group and the government. It is possible to have peace negotiations that include

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<sup>176</sup> Kreutz, Joakim. "How and when armed conflicts end: Introducing the UCDP Conflict Termination dataset." *Journal of Peace Research* 47, no. 2 (2010): 243-250.

no external mediators, but the literature suggests that this is highly uncommon, meaning that most peace negotiations are also peace mediations.<sup>177</sup> The dataset uses the following definition of mediation:

A process of conflict management where disputants seek the assistance of, or accept an offer of help from, an individual, group, or state, or organization to settle their conflict or resolve their differences without resorting to physical force or invoking the authority of law.<sup>178</sup>

To be included in the dataset, the peace negotiation needed to include an external mediator. Many civil war peace negotiations involve mediators, to the extent that the Civil War Mediation dataset is regularly used to analyze peace negotiations more broadly, not only peace mediations.<sup>179</sup>

There are two additional important notes about the unit of analysis. First, the Civil War Mediation dataset codes negotiations between the government and at least one rebel group. Although some peace negotiations occur between a government and multiple rebel groups in the same venue over the same issues, there are also instances where the government conducts different negotiations with different rebel groups. When the government is engaged in the same negotiations with multiple rebel groups, these negotiations are coded as one observation. However, when the government is engaged in parallel but separate negotiations with different rebel groups, these negotiations are coded as separate observations.

Second, the Civil War Mediation Dataset codes each attempt at peace negotiations as a separate peace negotiation. If the parties attempt to negotiate, but cancel the

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<sup>177</sup> Ibid.

<sup>178</sup> DeRouen Jr, Karl, Jacob Bercovitch, and Paulina Pospieszna. "Introducing the civil wars mediation (CWM) dataset." *Journal of peace research* 48, no. 5 (2011): 663-672.

<sup>179</sup> Gleditsch, Kristian Skrede, Nils W. Metternich, and Andrea Ruggeri. "Data and progress in peace and conflict research." *Journal of Peace Research* 51, no. 2 (2014): 301-314.

negotiations with no plans to resume talks, and then make a new attempt at negotiations shortly thereafter, these are coded as two separate observations of peace negotiations. However, if parties suspend negotiations with immediate plans to return to the table—that is, if one round of talks end, and both parties agree to resume another round of talks—this is coded as one observation of peace negotiations.

I dropped two observations from the original Civil War Mediation dataset. Both were of Ethiopia, and both were dropped because no rebel group was specified for either negotiation. It is also important to note that 16 observations lacked start dates for negotiations, and 25 observations lacked end dates. I retained all of these observations in the final dataset, and treated these observations as if the peace negotiations had lasted one day. The final dataset includes 367 observations of peace negotiations between a total of 48 states and 89 rebel groups.

### **3.0 The variables**

#### **3.1 The dependent variables**

This chapter uses two dependent variables. The first is a categorical measure of mediation outcome, coded into seven categories. This variable describes first, whether both the rebels and the government arrived at the negotiating table with the help of a mediator, and then, if they did, it describes the comprehensiveness of the agreement that the rebels and government arrived at when negotiations ended. The second is a dummy indicator of whether peace negotiations succeed or failed. The following two sub-sections describe each dependent variable in more detail.

### 3.1.1 Peace negotiation outcome

The indicator for the outcome of peace negotiations is coded into seven possible outcomes—no mediation offered, offered only, unsuccessful, ceasefire, partial settlement, full settlement, and process agreement.<sup>180</sup>

When no mediation was offered, no external mediator agreed to oversee peace talks, and there is no recorded observation of talks taking place. When the outcome is coded as offered only, an external mediator and one side in the civil war arrived at a previously agreed-upon site for formal peace talks and the other side(s) in the conflict failed to arrive for formal peace talks. When the outcome is coded as unsuccessful, each side in the conflict engaged in formal peace negotiations, but no agreement was reached. When the outcome is coded as a ceasefire, both sides engaged in formal peace talks with mediation, and agreed upon a ceasefire, but did not agree on a more comprehensive peace agreement. When the outcome is coded as a partial settlement, the sides agreed on a peace agreement that addressed some, but not all, issues of contention in the civil conflict. When the outcome is coded as a full settlement, the sides agreed on a peace agreement that addressed all issues of contention in the conflict. Finally, when the outcome is coded as a process agreement, the sides agreed on a peace agreement that addressed all issues of contention in the conflict and contained provisions for changing the government or political processes during peacetime to accommodate rebel grievances.

Data for this indicator are drawn entirely from the Civil War Mediation Dataset. The outcomes are summarized in Figures I and II, and are fairly well dispersed. As the percentages in Figure I indicate, each outcome is coded as being mutually exclusive; for

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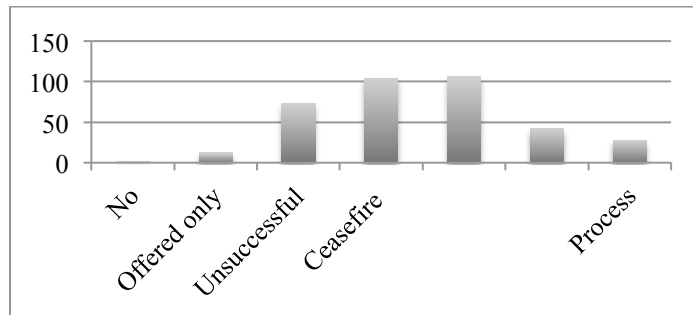
<sup>180</sup> This coding is drawn from the Civil War Mediation Dataset, and the subsequent paragraph's descriptions are paraphrased from the Civil War Mediation Dataset codebook.

example, even if a partial agreement that addresses some issues of contention in the conflict includes a ceasefire, it is only coded as a partial agreement.

Figure 3.1.1.1. Frequency Table of Mediation Outcomes

<b>Outcome</b>	<b>Count</b>	<b>Percentage</b>
<i>No mediation</i>	2	0.54%
<i>Offered only</i>	12	3.27%
<i>Unsuccessful</i>	73	19.89%
<i>Ceasefire</i>	104	28.34%
<i>Partial settlement</i>	106	28.88%
<i>Full settlement</i>	42	11.44%
<i>Process agreement</i>	28	7.63%

Figure 3.1.1.2. Histogram of Mediation Outcomes



### 3.1.2 Peace negotiation success

The second dependent variable in this chapter is a measure of successful mediation. I imposed a theoretically high threshold for success, as conceptualized by the extent of the agreement that the parties came to, as it is outside of the scope of this study to consider the duration of the peace. Thus, the success of the agreement is conceptualized as a function of the extent of the agreement, or the amount of issues of contention that it addresses.

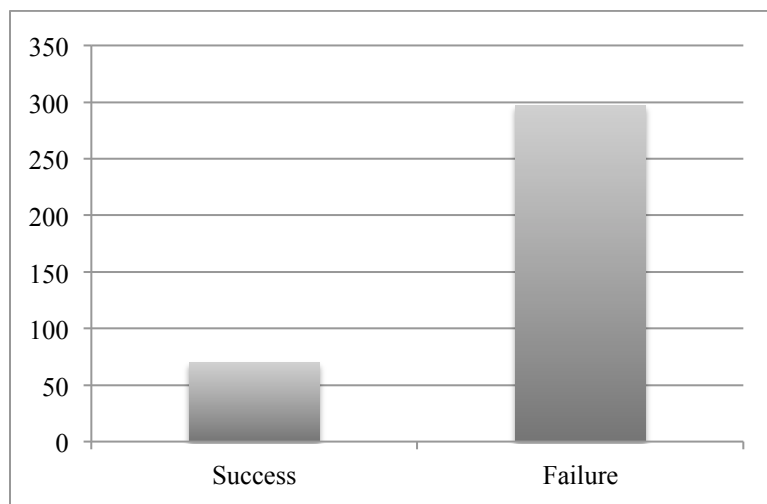
The variable for successful peace negotiations is a binary indicator constructed by recoding the measure for mediation outcome. If the mediation outcome is a full peace agreement or a process agreement, the peace negotiation is coded as successful. If the

mediation had any other outcome, it is coded as a failure. The observations of successful peace negotiations are summarized in Figures III and IV.

Figure 3.1.2.1. Frequency Table of Successful Mediation

Outcome	Count	Percentage
Success	70	19.07%
Failure	297	80.93%

Figure 3.1.2.2. Histogram of Successful Mediation



### 3.2 The independent variables

This chapter uses four independent variables, all of which are binary indicators of whether various kinds of justice mechanisms were used towards rebels either during peace negotiations or in the 6.47 years preceding them. I constructed these indicators by recoding observations from the During Conflict Justice Dataset. Since my theory is principally concerned with two dimensions of justice mechanisms—whether they are domestic or international, and whether they include prosecution or not—these four indicators are domestic non-prosecution, domestic prosecution, international non-prosecution, and international prosecution. It is extremely important to note that multiple kinds of justice mechanisms could be used preceding or during one peace negotiation;



therefore, these indicators are not mutually exclusive. Figure V provides summary statistics of the number of observations for each independent variable.

Figure 3.2.1. Frequency Table of Justice Mechanisms

<b>Justice Mechanism</b>	<b>Count</b>	<b>Percentage of Peace Negotiations</b>
No justice mechanism	95	25.89%
Domestic Non-prosecution	252	68.66%
Domestic Prosecution	216	58.86%
International Non-prosecution	49	13.35%
International prosecution	8	2.18%

### **3.2.1 Domestic non-prosecution**

This indicator is meant to comprise any justice mechanism that was mounted by the government towards the rebel group, and that did not include the initiation of prosecution. Therefore, this indicator includes a wide range of justice mechanisms, as coded in the During Conflict Justice dataset—truth commissions, amnesties, reparations, purges, and exiles.

Truth commissions are defined as “officially-sanctioned, temporary investigative bodies that focus on a pattern of abuse over a period of time.”<sup>181</sup> In the 367 observations of peace negotiations covered by this chapter, 38 of them had domestic truth commissions take place preceding or during. Amnesties are “a promise (or in some cases formal legislation” on the part of the ruling party to not prosecute or punish violators.”<sup>182</sup> In the data analyzed here, there are the government initiated amnesty proceedings for rebels in 208 peace negotiations, with 65 of these explicitly initiated under the aegis of peace negotiations. Reparations are operationalized as “compensation given by the state

<sup>181</sup> Codebook, p. 9. Cited from Hayner 2011, p. 14.

<sup>182</sup> Codebook, p. 12.

to an individual or group who was harmed in some way by the conflict.”<sup>183</sup> There were 83 recorded peace processes with reparations preceding or during the peace negotiations analyzed here, and 6 of these were explicitly associated with the peace process. Purges are operationalized as “the act of removing politicians, members of the armed forces or judiciary, or other members of society for their (alleged) collaboration with or participation in a conflict and limiting their influence accordingly.”<sup>184</sup> There are 50 peace negotiations involving purges, with 1 of these explicitly associated with a peace process. Finally, exiles are operationalized as “a period of forced absence from one’s home country,” and there are 45 peace negotiations that had at least one exile take place before or during negotiations.

Whenever there was an instance of a domestic truth commission, amnesty, reparation, purge, or exile, a domestic non-prosecution is recorded in the dataset. Since the indicator used here is a binary indicator, it does not account for the type of domestic non-prosecution, nor the amount of domestic non-prosecutorial justice mechanisms that took place. Figures 3.2.1.1 and 3.2.1.2 capture some of the variance in observations of domestic non-prosecutorial justice mechanisms in the data analyzed here.

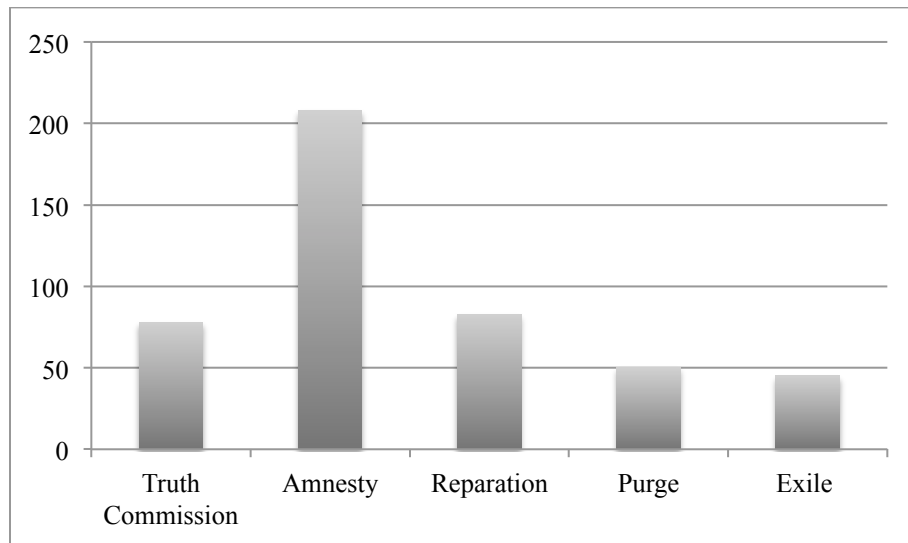
Figure 3.2.1.1. Frequency Table of the Disaggregated Observations of Domestic Non-Prosecution

<b>Justice Mechanism</b>	<b>Count</b>	<b>Percentage</b>
Truth Commission	78	21.25%
Amnesty	208	56.68%
Reparation	83	22.62%
Purge	50	13.62%
Exile	45	12.64%

<sup>183</sup> [http://www.justice-data.com/pcj-dataset/PCJ%20codebook%20-%20Binningsb%C3%B8%20et%20al%20JPR\\_49\(5\).pdf](http://www.justice-data.com/pcj-dataset/PCJ%20codebook%20-%20Binningsb%C3%B8%20et%20al%20JPR_49(5).pdf), p. 12

<sup>184</sup> Codebook, p. 14

Figure 3.2.1.2. Histogram of Incidences of Domestic Non-Prosecutorial Justice Mechanisms, by type



Overall, there are 252 peace negotiations in the dataset that have at least one instance of domestic non-prosecution, comprising 68.66% of the observations in the dataset.

### 3.2.2. Domestic Prosecution

This indicator captures any prosecution initiated by the government toward a rebel that takes place in a domestic venue. It is coded from the During Conflict Justice Dataset's observations of trials, operationalized as "the formal examination of alleged wrongdoing through judicial proceedings within a (quasi-) legal structure," and "can include domestic prosecutions, military courts (by either the government or rebel group), ad hoc tribunals, or international prosecutions." In this dataset, if the trial is initiated by the government and takes place in a domestic law court, military tribunal, or domestic ad-hoc tribunal, it is coded as a domestic prosecution.

It is important to note that there are some domestic trials that are conducted with international support, but that do not take place in an international venue and are not coded as international trials. This international support often includes legal personnel,

such as lawyers, judges, or staff; however, it can also include funding. This support is theoretically distinct from international prosecution, however, because even if the lawyer prosecuting the case or the judge handing down the verdict is from an international venue, the institution prosecuting the case and handing down the judgment is not an international institution, but the state. There are 57 such instances in these data, and they are coded as domestic prosecutions in this dataset.

Figure 3.2.2. Frequency Table of Disaggregated Domestic Prosecutions

<b>Description</b>	<b>Count</b>	<b>Percentage</b>
With International Support	57	15.53%
Without International support	208	56.68%

Overall, there was at least one domestic prosecution in 216 out of 367 peace negotiations, or in 58.86% of peace negotiations.

### **3.2.3 International non-prosecution**

Conceptually, this indicator is meant to comprise any justice mechanism that was mounted by an international institution towards the rebel group (and perhaps other actors), and that did not include the initiation of prosecution. Therefore, this indicator could include the same range of justice mechanisms comprised in the domestic non-prosecution indicator: truth commissions, amnesties, reparations, purges, and exiles. However, empirically, these data contain no observations of internationally initiated amnesties, reparations, purges, or exiles. Therefore, this indicator comprises truth commissions initiated, implemented or supported by international actors towards rebels.

International non-prosecutions can include international investigations. This introduces an area of overlap with international prosecutions, as international tribunals need to conduct investigations in order to be able to issue indictments and hold trials. The

key conceptual difference between international investigations that fall into the category of international non-prosecutions and investigations that fall into the category of international prosecution is that the body carrying out the investigations in this category does not have the capacity to issue indictments or bring culpable leaders to trial. Therefore, investigations conducted as part of non-prosecutorial justice mechanisms are analytically distinct from prosecutorial investigations because they are not designed to lead to prosecution. There are international non-prosecutorial justice mechanisms in 49 out of 367 observations of peace negotiations, or in 13.35% of observations.

### **3.2.4 International prosecution**

This indicator captures any prosecution initiated towards a rebel by an international court or tribunal. The During Conflict Dataset records an international trial when “the trial included international criminal prosecution, involved international actors such as lawyers and judges, or whether the trial took place in an international tribunal.”<sup>185</sup> 8 out of 367—or 2.18%—peace negotiations in the data here included the initiation of at least one international trial. The ICC was the venue of the international trial in two of these observations—in Libya in 2011 and Uganda in 2006. However, it is important to note that the trial variable only comprises cases where an ICC’s case has been successfully brought to trial—when a warrant has not only been released for an offender but he has been apprehended and brought to The Hague.

There are 8 observations of international prosecution, which is far lower than the count of observations of other justice mechanisms. The low count of instances of international prosecutions also pushes the traditional minimum of 10 observations per independent variable included in a logistic regression model. However, Vittinghoff and

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<sup>185</sup> Codebook, p. 12.

McCulloch suggest that this threshold can be lowered to 5-9 observations, and in logistic regression models with a binary primary predictor, they only found problems in 7.2% of analyses, most of which were concentrated in analyses with 2 predictors and fewer than 31 observations.<sup>186</sup> This analysis has 4 predictors and 367 observations. Since this analysis has 8 observations, which is well above the specified minimum of 5, and has more than ten times the number of observations where most low-observation related errors are found, there is reason to be confident that the low number of observations of international prosecution will not lead to errors in the results of this analysis.

### 3.3 The control variables

#### 3.3.1 Conflict intensity

This indicator is meant to indicate the extent of the conflict's human cost, and is operationalized as a binary indicator of whether there were over 1000 conflict deaths that year. These data are drawn from the UCDP/PRIO Dataset Version 4.<sup>187</sup> The original unit of analysis is the country year, and when the observation of peace negotiations spans multiple years, I use the UCDP/PRIO observation from the first year of the peace negotiation. This is the convention I use for all control variables recorded by country year, and instances of peace negotiations that spanned multiple years are summarized in Figure 3.3.1, below.

Figure 3.3.1. Peace Negotiations Lasting Longer than One Year

Country	Rebels	Negotiation Start	Negotiation End
Algeria	Salafist Group for Preaching and Combat	June 12, 2006	June 12, 2007
CAR	Army faction	August 1, 2001	November 2, 2002

<sup>186</sup> Vittinghoff, E., & McCulloch, C. E. 2007. Relaxing the rule of ten events per variable in logistic and Cox regression. *American Journal of Epidemiology*, 165(6): 710–718, p. 715

<sup>187</sup> Kreutz, Joakim. "How and when armed conflicts end: Introducing the UCDP Conflict Termination dataset." *Journal of Peace Research* 47, no. 2 (2010): 243-250.

CAR	Convention of Patriots for Justice and Peace	December 15, 2009	August 25, 2012
Colombia	Revolutionary Armed Forces of Colombia, National Liberation Army	June 11, 1999	November 25, 2002
Congo/Zaire	Movement for the Liberation of Congo, Rally for Congolese Democracy	July 20, 1999	February 13, 2001
DRC	Bundu Dia Kongo	November 19, 2008	December 20, 2009
DRC	National Congress for the Defense of the People	November 19, 2008	December 20, 2009
Ethiopia	Oromo Liberation Front	August 20, 2008	October 27, 2010
Georgia	Republic of Ngorno-Karabach	August 10, 2006	August 14, 2008
Guatemala	Guatemalan National Revolutionary Unity	January 11, 1994	June 16, 1995
Indonesia	Fretilin	August 5, 1998	August 30, 1999
Indonesia	Free Aceh Movement	January 7, 2001	December 9, 2002
Israel	Palestinian Liberation Organization (PLO) and non-PLO	October 8, 1997	November 20, 1999
Ivory Coast	Forces Nouvelles	October 19, 2002	June 29, 2005
Senegal	Movement of Democratic Forces of Casamance	January 2, 1992	July 8, 1993
Sierra Leone	Revolutionary United Front	February 21, 1999	May 28, 2000
Uganda	United Democratic Christian Army/Lord's Resistance Army	June 8, 2006	April 26, 2008

### 3.3.2 Mediation previous year

This variable indicates whether a mediation between the same government and rebel group(s) occurred within 365 days preceding the observed peace mediation. It is a binary indicator coded based on the Civil War Mediation Data. I control for this variable because it is the convention for research on peace negotiations, as the occurrence of mediation within the previous year stands to affect the outcome of the current mediation. If mediation took place within the previous year, the parties might be able to build on the

progress that occurred within that previous mediation, and thus might be better situated to come to a more comprehensive peace agreement.

### **3.3.3 Rebel capacity**

This variable is meant to capture the military strength of the rebel group. It is an estimate of rebel troop strength during a specified conflict period, which varies based on the rebel group and the data available. This measure was taken from the Non-State Actor Dataset Version 3.4.<sup>188</sup> I control for this variable because it is the convention for research on peace negotiations, as rebel groups and states are much more likely to come to agreements when a certain balance of military power exists between them. If one side is much more powerful than the other, negotiations are less likely to occur or continue because the powerful side can reasonably decide to resume the fight, as they are likely to win.

### **3.3.4 Government physical violence**

This variable is meant to capture the extent to which the government uses physical violence against its citizens. It is an ordinal, Bayesian-scaled measure of the extent to which people enjoy “freedom from political killings and torture by the government”<sup>189</sup> in a given country year, taken from the Varieties of Democracy dataset.<sup>190</sup> I include this control variable because the literature on transitional justice and particularly international prosecution has found that the specter of international prosecution matters differently when governments are understood to be culpable of

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<sup>188</sup> Cunningham, David E., Kristian Skrede Gleditsch, and Idean Salehyan. "Non-state actors in civil wars: A new dataset." *Conflict Management and Peace Science* 30, no. 5 (2013): 516-531.

<sup>189</sup> Varieties of Democracy codebook

<sup>190</sup> Lindberg, Staffan I., Michael Coppedge, John Gerring, and Jan Teorell. "V-Dem: A new way to measure democracy." *Journal of Democracy* 25, no. 3 (2014): 159-169.



human rights violations.<sup>191</sup> In other words, the government's human rights record is likely to matter for how it deals with the prospect of post-conflict justice.

### **3.3.5 High court independence**

This variable is meant to measure the extent to which the government deploys its justice system for political purposes, and the extent to which the justice system serves the interests of the people in power. It is an ordinal, Bayesian-scaled measure of how often the high court rules according to government preferences, regardless of legal interpretation.<sup>192</sup> It is recorded by country year, and taken from the Varieties of Democracy dataset. I include this control variable because it indicates the extent to which domestic justice mechanisms can be used as a political tool by the governing administration currently in power in the state. I control for this because it stands to condition the effects of domestic justice mechanisms, particularly domestic prosecutions. If domestic courts are perceived to merely be a tool of the government leaders who are in power, then domestic prosecutions will likely damage the outcomes of peace negotiations more than if domestic courts are perceived to be independent from the current government. Therefore, in hopes of more accurately assessing how domestic prosecution affects the outcome of peace negotiations, I try to control for the extent to which they are a tool of the government in power.

## **4.0 The method**

I employ two methods. First, I test a model specified with a binary dependent variable that indicates whether peace negotiations were successful; peace negotiation outcomes of full settlements or process agreements are coded as successful peace

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<sup>191</sup> Appel, Benjamin J. "In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?." *Journal of conflict resolution* 62, no. 1 (2018): 3-28.

<sup>192</sup> Varieties of Democracy codebook

negotiations, and all other negotiation outcomes are coded as failures. Due to the binary, non-ordered categorical variable, I specify a binomial logistic regression model.

Next, I test a model specified with the categorical dependent variable of the outcome of peace negotiations, coded as offered only, unsuccessful, ceasefire, partial settlement, full settlement, or process agreement. Since these outcomes are not ordered, I specify a multinomial logistic regression model, with no negotiation at all as the reference category.

## 5.0 The results

The binomial logistic regression indicates that international prosecutions have a distinctive effect on the success of peace negotiations. The results displayed in the following table show that international prosecution is the only kind of justice mechanism that has a statistically significant effect on the outcome of peace negotiations. Indeed, the results show that the involvement of international prosecution in a conflict situation makes peace negotiations about six times more likely to succeed.

Figure 3.5.1. Binomial Logistic Regression: Successful Peace Negotiation<sup>193</sup>

	<i>Coefficient</i>	<i>Odds Ratio</i>	<i>P-value</i>
<i>DNP</i>	-0.229 (0.343)	0.796 (0.273)	0.505
<i>NP</i>	-0.443 (0.340)	0.642 (0.218)	0.192
<i>INP</i>	0.344(0.456)	1.411 (0.643)	0.450
<i>IP</i>	1.807 (0.982)	6.095 (5.986)	0.066*
<i>Conflict intensity</i>	-1.532 (0.451)	0.216 (0.097)	0.001***
<i>Mediation previous year</i>	-0.295 (0.342)	0.745 (0.255)	0.389
<i>Rebel capacity</i>	-0.000 (0.000)	1.000 (0.000)	0.374
<i>Government physical violence</i>	-0.099 (0.132)	0.906 (0.119)	0.452
<i>High court independence</i>	0.772 (0.504)	2.165 (1.091)	0.125
<i>Constant</i>	0.711 (0.621)	2.037 (1.265)	0.252

<sup>193</sup> For the sake of legibility, in all results tables, I refer to the explanatory variables using abbreviations. DNP refers to domestic non-prosecution, DP refers to domestic prosecution, INP refers to international non-prosecution, and IP refers to international prosecution.

Number of observations: 365  
 Wald chi-squared (9): 27.32  
 Prob. > chi-squared: 0.0012  
 Log likelihood: -161.771  
 Pseudo R<sup>2</sup>: 0.0858  
 \*p<0.10, \*\*p<0.05, \*\*\*p<0.01

However, previous findings on how international tribunals can act as spoilers of peace negotiations suggest that this is not the whole story. Therefore, to see the conditional effect of international prosecutions on the outcome of peace negotiations, we need to examine the full panoply of possible peace negotiation outcomes, instead of a binary indicator of success or failure.

The results of the multinomial logistic regression also show that international prosecution has a distinctive, conditional effect on the outcome of peace negotiations. When compared to peace negotiations where there was no outside mediation offered, the involvement of an international tribunal makes the failure of peace negotiations more likely, but it also makes the creation of a process agreement more likely. The fourth row of the following table shows this, and the table in its entirety shows that only international prosecution has this conditional effect. The findings on the other kinds of justice mechanisms conform to what the literature would lead us to expect: domestic justice mechanisms, both prosecutorial and non-prosecutorial do not have a substantive impact on the outcome of peace negotiations, while international non-prosecutorial justice mechanisms promote the establishment of more comprehensive peace agreements.

Figure 3.5.2. Multinomial Logistic Regression: Peace Negotiation Outcomes (Coefficients)

Base Category: no mediation

	<i>Offered Only</i>	<i>Unsuccessful</i>	<i>Ceasefire</i>	<i>Partial Settlement</i>	<i>Full Settlement</i>	<i>Process Agreement</i>
<i>DNP</i>	-13.729 (1.788)** *	-13.352 (1.788)***	13.021 (1.423)** *	-13.828 (1.390)** *	-13.220 (1.434)** *	-14.108 (1.467)** *
<i>DP</i>	-14.485 (1.551)***	-13.218 (1.045)***	-14.448 (0.986)** *	-13.635 (1.036)** *	-14.359 (1.046)** *	-14.124 (1.100)** *
<i>INP</i>	1.050 (0.817)	12.608 (0.867)***	15.087 (0.714)** *	19.956 (0.596)** *	15.257 (0.606)** *	14.184 (0.882)** *
<i>IP</i>	12.790 (1.129)** *	2.173 (1.201)*	0.587 (1.315)	1.085 (1.713)	2.654 (1.989)	3.262 (1.625)**
<i>Conflict intensity</i>	15.139 (1.509)** *	13.234 (1.486)***	14.125 (1.495)** *	13.109 (1.482)** *	11.856 (1.543)** *	12.362 (1.653)** *
<i>Mediation previous year</i>	-0.223 (2.486)	0.492 (2.397)	0.052 (2.389)	0.414 (2.391)	-0.427 (2.410)	0.578 (2.437)
<i>Rebel capacity</i>	0.000 (0.000)** *	0.000 (0.000)***	0.000 (0.000)** *	0.000 (0.000)** *	0.000 (0.000)** *	0.000 (0.000)** *
<i>Government physical violence</i>	0.017 (0.575)	0.959 (0.470)**	0.731 (0.467)	0.955 (0.473)**	0.564 (0.492)	1.046 (0.494)**
<i>High court independence</i>	0.208 (4.373)	-6.341 (4.111)	-2.685 (4.124)	-4.392 (4.118)	-3.765 (4.157)	-2.785 (4.181)
<i>Constant</i>	10.898 (3.798)** *	17.466 (3.621)***	15.560 (3.645)** *	17.519 (3.615)** *	18.345 (3.659)** *	16.974 (3.782)** *

Number of observations: 365

Wald  $X^2$  (36):Prob.>  $X^2$ :

Log likelihood: -522.81

Pseudo  $R^2$ : 0.1133

It is often easier to interpret the results of a multinomial logistic regression when they are presented as relative risk ratios. Therefore, the following table presents these results. This table perhaps most clearly shows the magnitude of international prosecution's conditional effect. Even when compared to negotiations where there is no external mediator, the involvement of international prosecution in a peace process gives negotiations almost nine times the risk of failing. However, when compared to negotiations with no external mediator, the involvement of international prosecutions gives peace negotiations 26 times the risk of ending with a comprehensive agreement to create a new government.

Figure 3.5.3. Multinomial Logistic Regression: Peace Negotiation Outcomes (Relative Risk Ratios)

Base Category: no mediation

	<i>Offered Only</i>	<i>Unsuccessfu l</i>	<i>Ceasefire</i>	<i>Partial Settlement</i>	<i>Full Settlement</i>	<i>Process Agreement</i>
<i>DNP</i>	0.000 (0.000)** *	0.000 (0.000)***	0.000 (0.000)** *	0.000 (0.000)***	0.000 (0.000)***	0.000 (0.000)***
<i>DP</i>	0.000 (0.000)** *	0.000 (0.000)***	0.000 (0.000)** *	0.000 (0.000)***	0.000 (0.000)***	0.000 (0.000)***
<i>INP</i>	2.859 (2.335)	299,012.3 (259, 226.1)***	3,565,472 (2,546,30 8)***	3,127,510 (1,862,716) ***	4,228,666 (2,562,434) ***	1,445,970 (1,276,020) ***
<i>IP</i>	0.000 (0.000)** *	8.873 (10.551)*	1.978 (2.364)	2.960 (0.069)	14.212 (28.276)	26.095 (42.408)**
<i>Conflict intensity</i>	3,756,298 (5,668,12 8)***	558,959.2 (830,415)* **	1,363,302 (2,037,64 5)***	493,209.4 (731,057.5) ***	140,953.5 (217,573.6) ***	233,767.1 (386,535.4) ***
<i>Mediation previous year Rebel capacity</i>	0.800 (1.989)	1.636 (3.921)	1.053 (2.516)	1.513 (3.616)	0.652 (1.572)	1.782 (4.343)
	1.000 (0.000)** *	1.000 (0.000)***	1.000 (0.000)** *	1.000 (0.000)***	1.000 (0.000)***	1.000 (0.000)**

<i>Govern ment physical violence</i>	1.017 (0.585)**	2.608 (1.227)**	2.078 (0.971)	2.598 (1.229)**	1.760 (0.864)	2.845 (1.405)**
<i>High court independ ence</i>	1.231 (5.384)**	0.002 (0.007)	0.068 (0.281)	0.012 (0.051)	0.023 (0.096)	0.062 (0.258)
<i>Constant</i>	54,094.86 (205,473.8)***	38,500,000 (139,000,000)***	5,721,995 (20,900,000)***	40,600,000 (147,000,000)***	92,700,000 (339,000,000)***	23,500,000 (89,000,000)***

Number of observations: 365

Wald  $X^2$  (36):

Prob.>  $X^2$ :

Log likelihood: -522.806

Pseudo  $R^2$ : 0.113

Finally, because variance across a categorical outcome is sometimes easier to observe by examining marginal effects, rather than relative risk ratios, the following figures present the marginal effects of international prosecution on the outcomes of peace negotiations. The graph also shows that international prosecutions are associated with unsuccessful peace negotiations, or with peace negotiations that end in full settlements or process agreements. Peace negotiations that end in ceasefires or process agreements are comparatively less likely.

Figure 3.5.4. Graph of marginal effects of international prosecution on outcomes of peace negotiations

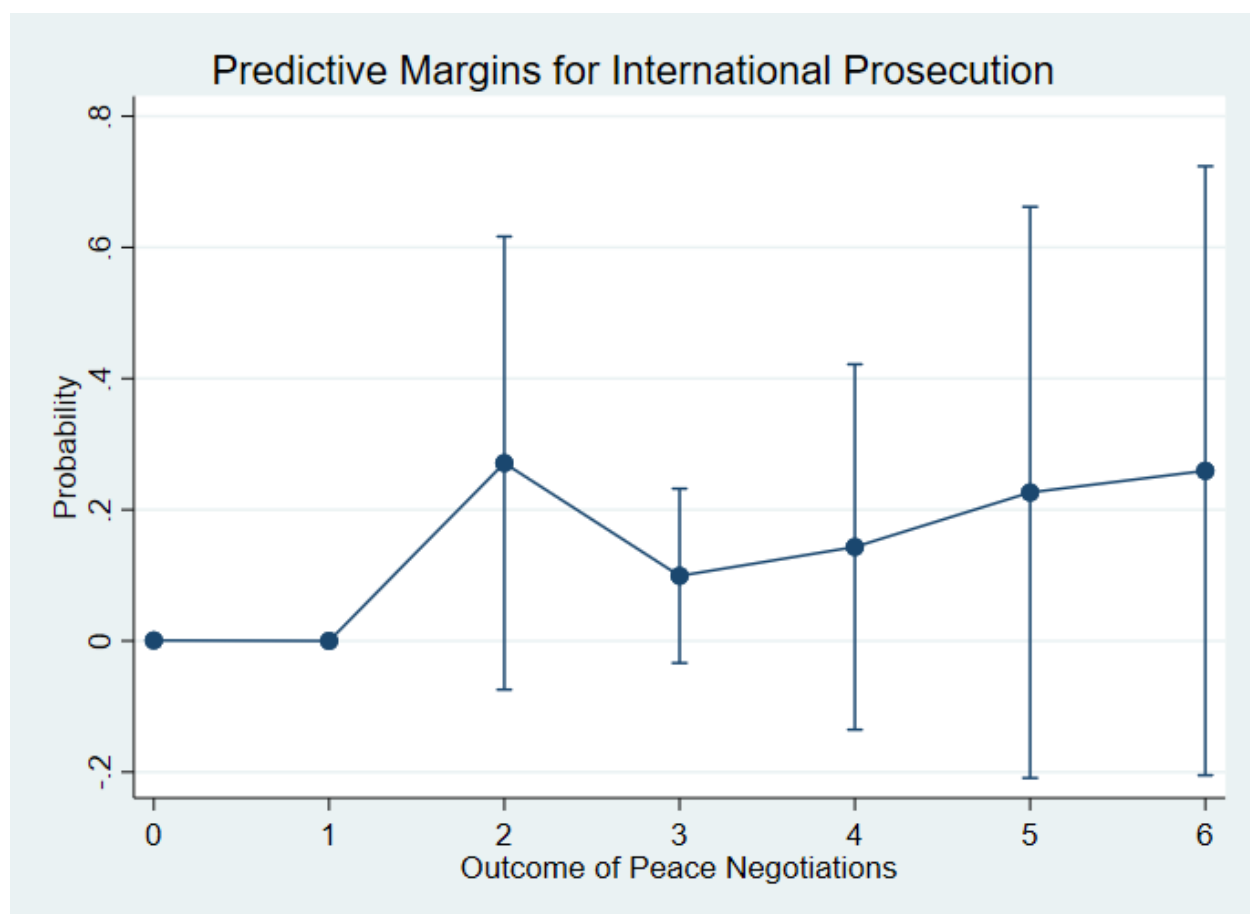


Figure 5.3.5. Table of marginal effects of international prosecution on outcomes of peace negotiations

<i>Peace negotiation outcome</i>	<i>Margin</i>	<i>Standard Error</i>
<i>No mediation (0)</i> <sup>194</sup>	0.001	0.001
<i>Offered only (1)</i>	0.000	0.000
<i>Unsuccessful (2)</i>	0.271	0.176
<i>Ceasefire (3)</i>	0.099	0.068
<i>Partial settlement (4)</i>	0.143	0.142
<i>Full settlement (5)</i>	0.226	0.222
<i>Process agreement (6)</i>	0.259	0.237

<sup>194</sup> The numbers in parentheses correspond to labels of outcomes on the graph in Figure 5.3.4, to provide reference for the names of these outcomes and the predicted probabilities plotted on the graph.

At first glance, the fact that none of the confidence intervals in Figure 5.3.4 exclude zero might solely indicate that the effect of international prosecutions on the outcome of peace negotiations is not statistically significant, Figure 5.3.4 tells a more complicated story. When predictive margins are calculated for logistic regression models, conditional effects are often suppressed in the output of the predictive margin. Therefore, the fact that the confidence intervals in Figure 5.3.4 include zero does not mean that international prosecution does not mean that international prosecution does not have a significant effect on the outcome of peace negotiations, but perhaps is further evidence that international prosecutions' have conditional effects.

## **6.0 The Implications**

These results come one step closer to answering the question of how to reconcile the disparate accounts of international prosecution both keeping leaders away from the table and propelling them to the table, and both spoiling peace negotiations and promoting more comprehensive peace agreements. These results indicate that this dual effect might not simply be anecdotal, but systematic and generalizable to the involvement of any international prosecutorial mechanism in conflict.

These results also suggest that, contrary to previous arguments, the impacts of international prosecutions in conflict termination may not be endogenous with the involvement of international institutions more broadly.<sup>195</sup> When analyzing the involvement of an international prosecutorial justice mechanism, these models control for the role of non-prosecutorial international justice mechanism. Although the results show that international non-prosecutorial justice mechanisms promote more successful peace

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<sup>195</sup> Dancy and Wiebelhaus-Brahm. "The impact of criminal prosecutions during intrastate conflict."



negotiations, even when controlling for this effect, the results still also show that international prosecution promotes the establishment of a full process agreement.

Most importantly to this dissertation, these findings show that international prosecutions have effects on peace negotiations that are distinct from international institutions and from prosecutorial justice mechanisms. If international prosecutions' conditional effects on peace negotiations were a function of their prosecutorial role, we would see domestic prosecutions having the same conditional effect, instead of no effect at all. Likewise, if international prosecutions' conditional effects on peace negotiations were a function of their international institutionalization, then we would expect international non-prosecutorial justice mechanisms to have the same conditional effect, instead of simply promoting more successful peace negotiations and more comprehensive peace agreements. What this suggests is that international prosecutions' conditional effect is a function of the combination of their international scope and prosecutorial capacity.

This leads to the questions of why institutions that have international scope and prosecutorial capacity are situated to have this conditional effect on peace negotiations, what determines when they spoil peace negotiations, and what determines when they promote more comprehensive peace agreements. The analysis presented in this chapter is not sufficient to answer these questions; all it suggests is that these questions are grounded in systematic patterns across a wide universe of civil war peace negotiations.

## **7.0 Conclusion**

This analysis established that the conditional effect of international prosecution is indeed systematic, and also found evidence that the conditional effect is due to the combination of international institutionalization and prosecutorial capacity. Still, in order

to understand why international prosecutions' effect is conditional, we need to parse out the conditions present when international prosecutions make negotiations more likely to fail, and the conditions present when they make negotiations more likely succeed. This chapter does not contain sufficient data to do this.

Instead, this will be the task of the rest of the dissertation. In the following three chapters, I will present three qualitative case studies of three of the observations of peace negotiations included in this chapter's dataset. Chapter 4 presents the case of the Juba Peace Process in Uganda, which involved international prosecution and which is coded in this dataset as unsuccessful. Chapter 5 presents the case of the Colombian peace process, which also involved international prosecution of the ICC examination into the situation, and which is coded in this dataset as having achieved a process agreement, the most successful possible outcome of peace negotiations. Chapter 6 presents the case of Sri Lanka, which had international non-prosecution, but no international prosecution, and which this dataset codes as having reached a ceasefire.

These three cases also show the conditional effect of international prosecution. One case that involved international prosecution failed completely, while the other case achieved a full process agreement. The case that did not involve international prosecution, Sri Lanka, neither completely failed nor completely succeeded, because it resulted in a ceasefire agreement.

This chapter's results indicate that there is something about the nature of the institutions that advance international prosecutions that gives international prosecutions the potential to both enhance peace negotiations' success and contribute to their failure. The fact that neither all prosecutorial justice mechanisms nor all international justice

mechanisms have the same conditional effect as international prosecutions suggests that there is something about the combination of the international scope and the prosecutorial mechanism that yields this conditional effect. Seeing as international prosecutions can only be mounted a few institutions, to examine the conditional effects of international prosecutions, the three qualitative cases all focus on the only institution with the legal mandate to conduct international prosecutions for cases around the globe: the ICC.

## **CHAPTER 4 | THE ICC AS SPOILER IN UGANDA**

### **1.0 Introduction**

In this dissertation, I argue that the ICC can alternately serve as a guarantor or a spoiler of peace negotiations, and that the ICC's effect on the outcome of peace negotiations depends on whether it plays a prosecutorial or oversight role. Crucially, I argue that whether the Court plays a prosecutorial role does not simply depend on whether it has formally initiated prosecutions by issuing indictments, releasing arrest warrants, or starting trial proceedings. Instead, I argue that the Court's public approach to the conflict situation, as well as how the Court's role coincides with the actions of other human rights promoters and potential peace guarantors, is key for determining whether the Court acts as a prosecutor in the conflict, and thus a spoiler of the peace.

In the previous chapter, I showed systematic, cross-national empirical evidence that international prosecution plays a dual role in peace negotiations: it can either promote the creation of a more comprehensive peace agreement, or it can make peace negotiations more likely to fail completely. This finding suggests that conditional factors are at play, and that the factors that influence whether the ICC promotes better peace agreements or spoils negotiations are situation-specific, and cannot entirely be parsed out using cross-national quantitative data.

Therefore, to examine the factors that condition whether the ICC can spoil or promote peace agreements, I turn to qualitative case studies of peace negotiations where the ICC played a prominent role. I theorized that whether the ICC promotes peace agreements depends on whether it plays a prosecutorial or oversight role. This chapter examines a case where the ICC played a prosecutorial role, and where peace negotiations

ultimately failed: the Juba Peace Process, where the government of Uganda (GoU) and the Lord's Resistance Army (LRA) attempted to negotiate an end to an almost two-decade long civil war.

Those familiar with the tired peace-justice debate, or who have followed the ICC's development since the signing of the Rome Statute, will recognize this case, as it is often couched as the classic case of the ICC acting as a spoiler of the peace. Several explanations have been offered for this. ICC arrest warrants for the LRA's five most powerful leaders precluded their full participation in peace talks, thus contributing to their failure.<sup>196</sup> The ICC's focus on the LRA's crimes, while the GoU also abused human rights during the conflict, detracted from the Court's legitimacy among northern Ugandans and on the international stage.<sup>197</sup> Indeed, the current understanding of the Court's role in the peace process is dominated by these two narratives: the first, of how fear of ICC prosecution kept LRA leaders away from the talks, the second, of how its involvement was indicative of a broader disconnect between the Ugandans who had been directly touched by the war, and the international community that saw Uganda as a venue in which to advance its own agenda. Indeed, all of these interpretations contribute to the argument that there is no way that an institution like the ICC can issue indictments for culpable leaders without spoiling fragile peace processes.

In this chapter, I too argue that the ICC served as a spoiler of Uganda's peace process, but I do not argue this out of a contention that the specter of prosecution

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<sup>196</sup> Apuuli, Kasaija Phillip. "The ICC arrest warrants for the Lord's Resistance Army leaders and peace prospects for Northern Uganda." *Journal of International Criminal Justice* 4, no. 1 (2006): 179-187

<sup>197</sup> Branch, "Uganda's civil war and the politics of ICC intervention."; Glasius, Marlies. "What is Global Justice and Who Decides-Civil Society and Victim Responses to the International Criminal Court's Investigations." *Hum. Rts. Q.* 31 (2009): 496; Nouwen, Sarah MH, and Wouter G. Werner. "Doing justice to the political: The international criminal court in Uganda and Sudan." *European Journal of International Law* 21, no. 4 (2010): 941-965; Branch, Adam. *Displacing human rights: war and intervention in northern Uganda*. Oxford University Press, 2011.

inevitably spoils peace processes, or that leaders need to be completely secure of an optimal post-conflict fate in order to make peace. Instead, I argue that the ICC spoiled the Ugandan peace process because it played a prosecutorial rather than an oversight role, therefore that the ICC spoiled the peace process because it represented an active, uncontrollable threat to LRA leaders' exit options. The ICC become one more check in the column of reasons that it made more sense for LRA leaders to continue the fight than to continue to make peace.

Crucially, I argue that the ICC spoiled the Ugandan peace process not because it represented a threat of prosecution, but because it represented an active threat of prosecution that LRA leaders decided that they could not use the peace process to neutralize. I argue that this is about much more than the fact that the ICC issued arrest warrants for culpable leaders. My case study shows that the ICC did not play a prosecutorial role in Uganda until after those arrest warrants were issued, and the key reasons that the ICC assumed this role are the ICC's emphasis on international prosecution over justice more broadly construed, and the fact that domestic and international human right advocates, as well as other potential guarantors to the peace, often publicly contradicted the ICC's anti-impunity message, thus prompting the ICC to issue public statements that constituted increased and repeated threats to leaders' exit options.

To illustrate this theory, this chapter examines the Juba Peace Process, which formally began in July 2006 and ended in November 2008. It also examines four years of LRA attempts at negotiations preceding the peace process, during which the ICC was involved in the conflict, shows that ICC involvement in the conflict did not deter the

LRA from engaging in peace negotiations. Especially notably, the LRA continued to attempt to initiate a formal peace process that became the Juba Peace Process even after the ICC issued arrest warrants for LRA leaders in late 2005.<sup>198</sup> However, by the time the Juba Peace Process was formally underway, the ICC played the role of a prosecutor rather than an overseer, and thus contributed to the LRA's abandonment of the negotiations and the ultimate failure of the Juba Peace Process.

This chapter proceeds in six subsequent parts. In the second part, I provide important context on the civil war between the LRA and the GoU, and then some notes on case selection. Third, I detail the source material used in this chapter. Then, I present a case study, beginning with attempts at peace negotiations that took place from 2002 to 2004, which were initiated both by the GoU and LRA. Then, I describe the LRA's endeavor to initiate peace negotiations with the Ugandan government in 2005, which led to the Juba Peace Process of 2006-2008, and then I describe the Juba Peace Process, and its failure in 2008. The sixth section explains this case's implications for this dissertation's theory, and the seventh section concludes and points the way to the next chapter.

## **2.0 The context**

The conflict between Uganda and the LRA began in 1986, and persisted until the LRA completely moved its operations into other states around 2010. The location of Uganda is indicated below, in Figure 4.2. The LRA arose in northern Uganda, where, in the late 1980s, the recently inaugurated President Museveni's militia carried out reprisal attacks against northern Ugandan ethnic groups who had opposed his ascension to the

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<sup>198</sup> "Kony et al. Case" *International Criminal Court* <https://www.icc-cpi.int/uganda/kony> Accessed March 25, 2019.

presidency. An armed resistance movement formed, led by Alice Lakwena, who claimed to be a prophet who channeled Christian and local deities.

Figure 4.2. Map indicating the location of Uganda<sup>199</sup>



Joseph Kony, Lakwena's nephew, assumed leadership of the group, and it evolved into the Lord's Resistance Army, claiming to fight both for Christian ideals, and for northern Ugandans, who felt themselves persecuted and politically marginalized by the more powerful south. In 1991, the central government of Uganda began a military operation to defeat the LRA, which led to a first set of failed peace accords.

During the mid-1990s, the LRA was able to continue and intensify its fight due to military support from Sudan, a regional rival of Uganda. During this time, the LRA's tactics included the strategic use of atrocity. Kidnapping children and forcing them to serve as soldiers augmented LRA troops and also ensured coerced support from northern Ugandans who feared for their abducted children's safety. Mass murders of civilians

<sup>199</sup> This image is available at: <https://www.freeworldmaps.net/africa/uganda/location.html>.



created widespread fear throughout northern Uganda, and prompted the GoU to undertake repressive protection measures, such as requiring northern Ugandan civilians to live in internally displaced person camps.

In 2002, the GoU started Operation Iron Fist, a military initiative aimed at rooting out the LRA's bases in southern Sudan and decimating LRA military forces. In response, the LRA increased their attacks on civilians living around the border between Sudan and Uganda. It is in this military context that the chapter's case study begins.

### **3.0 The case selection**

In Chapter 1, I wrote that this case is included because it is, for many, the classic case of the ICC acting as a spoiler of civil war peace negotiations. However, I also chose this case because the questions of post-conflict justice and how it should be institutionalized were present in the conflict well before the ICC opened its investigation. Throughout the conflict, Uganda's stance on post-conflict justice has been rife with complications and switchbacks. Uganda has alternately supported ICC prosecution, prosecution in domestic courts, and traditional justice practices of varying severity, with some lenient enough to constitute amnesty. This variation lends analytical leverage by which to examine the differential effects of human rights oversight versus international criminal prosecution, and to show that the prospect of justice at the ICC matters differently than the broader prospect of post-conflict justice.

The LRA has also demonstrated various levels of resolve and commitment to negotiating peace, ranging from actual executions of those who attempt to start peace talks to sustained, years-long support of delegations at international peace negotiations, and efforts to reach out to civil society organizations, mediators, and the international

community to communicate their dedication to working for peace. While virtually all accounts of the conflict agree that the LRA's willingness to work for peace is inextricably linked with its trust in the Ugandan government to do the same, my theory posits that ICC involvement should also condition rebels' commitment to negotiating peace. The fact that the LRA attempted to negotiate peace both before and after the ICC became formally involved in the conflict situation gives analytical leverage to see how the ICC might affect leaders' propensity to arrive at the negotiating table.

Finally, it should be acknowledged that some consider the LRA rebellion to be part of a proxy war between Sudan and the GoU, as Sudan funded, armed, and allowed the LRA to have bases in its borders in an attempt to destabilize the GoU, while the GoU also gave substantial support to the Sudanese People's Liberation Army to destabilize Sudan. Therefore, there are legitimate questions about whether the conflict between the LRA and Uganda can be considered a civil war in the same way that the Colombia and Sri Lankan conflicts are. However, the characterization of the LRA insurrection as a Sudanese proxy war is only true for certain earlier phases of the conflict, and largely ceases to be the case after 2000, when Sudan and the GoU agreed to stop sponsoring each other's rebel groups.<sup>200</sup> Furthermore, while the LRA certainly engaged with states besides Uganda, its relationship with Uganda is consistently the most important for prospects for peace.

#### **4.0 The data and methods**

This case study presents narratives of discrete, consecutive periods of peace negotiations within the GoU's decades-long conflict with the LRA: the LRA's attempts at

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<sup>200</sup> Nairobi Agreement. 8 December 1999.

<https://www.cartercenter.org/documents/nondatabase/nairobi%20agreement%201999.html> Accessed March 25, 2019.

peace negotiations from 2002-2005, the onset of the Juba Peace Process, and the outcome of the Juba Peace process. For each period, I construct a narrative that demonstrates the effect of human rights oversight, ICC involvement, and GoU support for ICC prosecution, on the rebels' confidence in Uganda's credibility, and on the outcome of peace negotiations more generally.

I rely on various kinds of sources to trace what happened in each of the three periods of peace negotiations analyzed here. Most central are the first-hand accounts of those directly involved in negotiations, or those who directly observed them. During the summer of 2017, I conducted confidential and anonymous interviews with key observers of the Juba Peace Process, and I draw from the published accounts of mediators who worked on behalf of the LRA, Uganda and third parties; they include James Alfred Obita, Patrick Oguro Otto, Joyce Neu, Father Carlos Rodriguez Soto, King David Onen Rwot Akana, Barney Afako, Julian Hottinger, and David Smock. I also draw from the published accounts of journalists and researchers who were in South Sudan or northern Uganda during key negotiations, including Matthew Green, Marieke Schomerus, Sverker Finnstrom, Aili Marie Tripp, Adam Branch, and Chris Dolan. When the insights they offer are directly derived from observations in the field, these accounts are used as primary sources. I also use them to corroborate and contextualize the accounts of the observers I interviewed.

For further corroboration, I also consulted USAID and NGO reports. I consulted NGO reports to trace how NGOs' public stances first reinforced and then contradicted the ICC's, as this is a key aspect of my theory of how the ICC can spoil or help guarantee peace negotiations. Finally, I used the Ugandan newspapers New Vision and The

Monitor, as well as international news services such as IRIN, Reuters, and the BBC, for precise reporting of the dates of key events, especially concerning the military aspect of the conflict. It is important to note that The Monitor is a Ugandan government newspaper, and that New Vision's reporting is sometimes constrained by government control of information in Uganda, and so these sources should be considered accordingly.

## **5.0 The case study**

### **5.1 The growing shadow of the ICC**

In the spring of 2002, the GoU began to aggressively and publically advocate for the creation of an international criminal court. In April, Uganda's prime minister publically called for the swift ratification of the Rome Statute and creation of the ICC specifically so that the GoU could prosecute the LRA leadership for crimes against humanity on an international stage.<sup>201</sup> Two months later, in June 2002, Uganda ratified the Rome Statute.<sup>202</sup>

Human rights advocates were initially positive about the ICC. In June 2003, AI strongly advocated for the Rome Statute's anti-impunity norms when it issued an open letter urging Ugandan members of Parliament to refuse to ratify a Bilateral Immunity Agreement (BIA) with the US.<sup>203</sup> This BIA would contravene Uganda's Rome Statute obligations because Uganda would promise to turn over Americans wanted by the ICC to the US, and not the Court.<sup>204</sup> In urging Uganda not to ratify this agreement, AI was

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<sup>201</sup> UN IRIN 9 April 2002

<sup>202</sup> Coalition on the International Criminal Court. "Uganda." <http://www.iccnw.org/?mod=country&iduct=181> Accessed March 25, 2019.

<sup>203</sup> MacPherson, Martin. "Open letter to all members of parliament in Uganda urging rejection of the impunity agreement with the USA concerning the International Criminal Court." *Amnesty International*. June 23, 2003. <https://www.amnesty.org/download/Documents/100000/afr590082003en.pdf>, Accessed March 25, 2019. p. 2.

<sup>204</sup> "Bilateral Immunity Agreements." American NGO Coalition for the International Criminal Court. <https://www.amicc.org/bilateral-immunity-agreements-1> Accessed March 25, 2019.

strongly advocating on behalf of Rome Statute norms, and reinforcing the ICC's normative commitment and international mandate.

Throughout this period, the LRA gave no indication that the GoU and civil society advocacy of the ICC motivated them to or dissuaded them from negotiating peace. They did, however, use the specter of international prosecution as a tool to keep their troops in line. To the panoply of threats they used to keep soldiers from escaping, they added the new menace of being turned over to a foreign Court upon return to their villages.<sup>205</sup> In the spring of 2002, Kony gave orders to reach out to Father Carlos Rodriguez Soto, a priest who was a member of two prominent civil society organizations that promoted human rights in Northern Uganda: the Justice and Peace Commission of the Archdiocese of Gulu and the Acholi Religious Leaders Peace Initiative.<sup>206</sup> Kony and Soto met in early March, amidst the UPDF's Operation Iron First, the government's most intense military offensive yet against the LRA.<sup>207</sup> Soto emerged from the meeting with the sense that Kony was open to making peace.<sup>208</sup>

Kony arranged for another meeting with Soto that August, and it backfired tremendously. In his recounting to Matthew Green, a British journalist, Soto recollects his first conversation with an LRA leader, who said "If Museveni doesn't want peace, then everybody's going to die. Even small children are going to die. We're going to kill everybody."<sup>209</sup> The words were scarcely out of his mouth when GoU soldiers burst through the bush and raided the camps. They arrested Soto as an LRA collaborator, and

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<sup>205</sup> Interview 3185

<sup>206</sup> Soto, José Carlos Rodríguez. "Conflict and governability in Northern Uganda: Possibilities and limits of mato oput reconciliation rituals." *Revista CIDOB d'Afers Internacionals* 2009, no. 87 (2009): 147-166.

<sup>207</sup> Tripp, Aili Mari. *Museveni's Uganda: paradoxes of power in a hybrid regime*. Vol. 6. Boulder, CO: Lynne Rienner Publishers, 2010, p. 167

<sup>208</sup> Green, Matthew. *The wizard of the Nile*. Portobello Books, 2012., p. 114.

<sup>209</sup> Ibid, p. 115.

compelled him to sign a statement admitting responsibility for the incident.<sup>210</sup> Ugandan newspapers subsequently published stories that Soto had been smuggling drugs to the LRA, that he sold them weapons, or that he was a Basque terrorist.<sup>211</sup>

That fall, the Ugandan government attempted to begin peace negotiations on its own terms. Museveni established a Presidential Peace Team, and called on the LRA to create safe zones from the fighting so that the Team could meet with local stakeholders to begin to negotiate peace.<sup>212</sup> The LRA completely ignored them.

Despite his run-in with the GoU troops, Soto remained undeterred. Upon the death of Kony's father in 2003, the archbishop of Gulu sent a letter to Kony, in which he reminded him of the Acholi cultural tradition that the time after death was a time of reconciliation.<sup>213</sup> When the LRA responded that it was still willing to talk peace, Soto and a delegation of local religious leaders travelled to the LRA camp on the first day of March.<sup>214</sup> The delegation gained access to the camp, where they spoke with Kony via short-wave radio. He agreed to an LRA ceasefire, and asked Soto to pray for peace.<sup>215</sup> However, later that day, Kony had four LRA soldiers executed for speaking to Soto's delegation, and he ordered that Soto himself be killed.<sup>216</sup>

The Presidential Peace Team remained both active and ineffectual in northern Uganda. In April 2003, the GoU made and quickly rescinded an offer of a ceasefire to the LRA.<sup>217</sup> Four weeks later, the LRA raided Soto's seminary, and abducted 43 priests in

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<sup>210</sup> Ibid, p. 115

<sup>211</sup> Ibid, p. 117

<sup>212</sup> Dolan, Chris. "Peace and conflict in northern Uganda 2002-06." *Accord-an international review of peace initiatives.*, Update to Issue 11 (2010): 8-9, p.9

<sup>213</sup> Green, *The wizard of the Nile*, p. 121

<sup>214</sup> Ibid, p. 122

<sup>215</sup> Ibid, p. 122

<sup>216</sup> Ibid, p. 124

<sup>217</sup> Dolan, "Peace and conflict in northern Uganda 2002-06." p.9

training.<sup>218</sup> Fighting in the north continued throughout the end of 2003, even as the GoU formally referred the conflict to the ICC on December 16, 2003. Very shortly after, and several months before actually formally opening an investigation into the situation, ICC Prosecutor Moreno-Ocampo publicly announced that the ICC would investigate the situation.<sup>219</sup>

The prospect of the oversight of an international criminal court—and the Ugandan government’s direct threats to use that court to arrest, apprehend, and prosecute LRA leaders—clearly had no effect on the LRA’s willingness to negotiate peace with the Ugandan government. It did not dissuade them from negotiating peace, as shown by their attempts to reach out to Soto. However, as shown by the LRA’s numerous switchbacks in their treatment of Soto and their willingness to discuss peace negotiations, the establishment of the Court clearly did not compel the LRA to decisively and consistently pursue peace negotiations.

There is no indication that the prospect of the Court influenced this calculation, which affirms the theoretical expectation that, if the ICC is not playing a prosecutorial role in the conflict situation, it does not deter rebels from arriving at the negotiating table. Further, the fact that the LRA used the threat of prosecution to intimidate their troops showed that they were well aware that it existed. Still, in the absence of arrest warrants and threatening rhetoric from the Court, they simply did not see the threat of arrest as credible enough to keep them away from the negotiating table.

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<sup>218</sup> Green, *The wizard of the Nile*, p. 124

<sup>219</sup> Adam Branch, “International Justice, Local Injustice,” *Dissent* 51 (Summer2004),; available at [www.dissentmagazine.org/article/?article%4336](http://www.dissentmagazine.org/article/?article%4336)

## 5.2 The onset of the Juba Peace Process

Even without arrest warrants, the ICC was clearly on the LRA's radar, and for good reason. In July of 2004, the ICC Prosecutor formally opened a full investigation into LRA leaders for atrocities committed against civilians.<sup>220</sup> This investigation was explicitly focused on LRA high commanders, and did not include GoU leaders, even though they had also been accused of overseeing human rights abuses.<sup>221</sup> Soto, the human rights advocate to whom the LRA had previously reached out to make peace, expressed misgivings about this step, saying "Obviously, nobody can convince the leaders of a rebel movement to come to the negotiating table and at the same time tell them that they will appear in courts to be prosecuted."<sup>222</sup> The human rights organizations that Soto worked with, the Justice and Peace Commission of the Gulu archdiocese and the Acholi Religious Leaders Peace Initiative, would also come to take up this stance,<sup>223</sup> which both emphasized the Court's role as prosecutor, and questioned whether that role was compatible with the goal of making peace.

However, not all human rights advocates contradicted the Court at this point. In February 2005, shortly after the ICC announced its intention to open an investigation into the LRA, the International Crisis Group (ICG) released a statement saying that ICC involvement in northern Uganda was a positive development.<sup>224</sup> Crucially, the ICG characterized the ICC's involvement as an investigation, and not as an impending

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<sup>220</sup> "Uganda." Coalition for the International Criminal Court.

<http://www.coalitionfortheicc.org/country/uganda> Accessed March 25, 2019.

<sup>221</sup> Branch, "Uganda's civil war and the politics of ICC intervention."

<sup>222</sup> Cited in Adam Branch, "International Justice, Local Injustice," *Dissent* 51 (Summer 2004), p.24; available at [www.dissentmagazine.org/article/?article%4336](http://www.dissentmagazine.org/article/?article%4336)

<sup>223</sup> Interview 3185

<sup>224</sup> "Peace in Northern Uganda: Decisive Weeks Ahead." *International Crisis Group*. February 21, 2005. <https://www.crisisgroup.org/africa/horn-africa/uganda/peace-northern-uganda-decisive-weeks-ahead> Accessed March 25, 2019



prosecution, and said that it was increasing LRA and government incentives to make peace.<sup>225</sup> However, the ICG also hinted at problems to come when it urged the ICC to hold off on issuing any arrest warrants until there was a clearer direction for the peace process.<sup>226</sup>

When the ICC moved quickly towards preparing indictments and issuing warrants, the ICG changed its stance. In April 2005, it released a report warning that ICC indictments could deter the LRA from engaging in the peace process.<sup>227</sup> The report was neither fully supportive nor completely critical of the ICC's role, saying that:

The International Criminal Court (ICC) is prepared to issue warrants against LRA leaders suspected of committing crimes against humanity, a step that if not handled carefully could drive the rebels definitively out of the peace process. However, the ICC is well aware of the risk and is undertaking a series of activities which have increased mutual understanding with Northern Ugandan civil society.<sup>228</sup>

What is important about this statement is not so much the lack of critique or affirmation, but the fact that, even at this early, stage, before it had issued indictments or arrest warrants, a prominent international NGO was already portraying the ICC's role in the conflict situation as prosecutorial without expressing any support for the prospect of prosecuting culpable leaders. This is the exact inverse of the approach that I argue most enhances the ICC's potential to be a guarantor in a conflict situation, precisely because it casts the ICC as a prosecutor and not an overseer, and also portrays ICC involvement not as promoting justice, but as threatening peace.

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<sup>225</sup> Ibid

<sup>226</sup> Ibid

<sup>227</sup> "Shock Therapy for Northern Uganda's Peace Process." *International Crisis Group*. April 11, 2005 <https://www.crisisgroup.org/africa/horn-africa/uganda/shock-therapy-northern-ugandas-peace-process> Accessed March 25, 2019

<sup>228</sup> ibid

Meanwhile, throughout 2005, the LRA reached out to experts to attempt to learn more about the ICC and the threat it posed. Marieke Schomerus, a researcher with unparalleled access to the LRA at the time, recalls:

One of the men handed Tim<sup>229</sup> a note, requesting a private meeting. The young men wanted to tell us that life outside the LRA was tough, but they also wanted to know more about what was going on outside Uganda. What exactly was the ICC planning to do?<sup>230</sup>

Schomerus does not specify how she answered the LRA's question. However, as a doctoral candidate doing field research on the war in Uganda, she very likely knew the specific details of the Rome Statute that would be pertinent to the LRA's situation. She continued to speak with LRA leadership throughout 2005:

In the late summer of 2005, one of the young men told me that Otti wanted to talk to me. It did not make any sense. Why would he want to talk to me? It seemed like a scam. I heard someone laughing on the other end of the phone line. "I am Vincent Otti," the voice said.

It seemed ridiculously easy to get Otti on the phone. He was talkative, telling me how the LRA was doing in their camp and that they were moving around a lot. I asked where he was and why he wanted to talk to me. He knew about me, he said, from his men. His men had told him that I had information. He wanted to talk about the possibilities for peace, and he wanted to know more about the ICC. The ICC had not yet issued warrants for the LRA leadership, but rumours were rife that they existed. Otti did not know what the ICC involvement meant. His understanding was that he would be taken to a foreign location and executed.<sup>231</sup>

This conversation with Otti provides definitive evidence that the LRA leaders considered the ICC primarily in terms of how it stood to impact their personal exit options, and that they feared that the ICC had the potential to punish them post-conflict.

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<sup>229</sup> "Tim" here is Tim Allen, an anthropologist and an expert on northern Uganda and the LRA, who along with Schomerus and some others, was conducting fieldwork in northern Uganda during the height of the LRA insurrection and Juba Peace Process.

<sup>230</sup> Schomerus, Marieke. "Chasing the Kony Story," p. 3

<sup>231</sup> Ibid.

Again, Schomerus does not reveal the information about the ICC that she gave to the LRA leadership. However, she continued to speak to the LRA leaders for months; she was granted access on the condition that she gave them “useful advice on the ICC.”<sup>232</sup> For months prior to this, Schomerus had been in deep and constant contact with LRA leadership, and had worked hard to build their trust long before the LRA broached the issue of the ICC with her.<sup>233</sup> The fact that the LRA asked Schomerus for insight on the LRA, in light of their long-standing and established trust with her, shows that they regarded it to be politically sensitive, and that they wanted their conversations about it to be protected.

While the LRA was learning about the ICC and preparing for peace talks, human rights advocates continued to criticize the role of the ICC in the conflict situation, and publicly fret about its implications for the peace process. The ICG issued a report saying that the prospect of ICC arrest warrants could drive important mediators away from the peace process, and that the anticipation of ICC arrest warrants was already compromising peace advocates’ faith in the process.<sup>234</sup>

In July 2005, the ICC issued arrest warrants for the LRA’s five most powerful commanders, Joseph Kony chief among them.<sup>235</sup> In an ominous signal, Betty Bigombe,<sup>236</sup> one of the most important mediators in the peace process, decided to leave the process

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<sup>232</sup> Ibid, p. 5

<sup>233</sup> Interview 3185

<sup>234</sup> “Building a Comprehensive Peace Strategy for Northern Uganda” *International Crisis Group*. June 23, 2005. <https://www.crisisgroup.org/africa/horn-africa/uganda/building-comprehensive-peace-strategy-northern-uganda> Accessed March 25, 2019

<sup>235</sup> Ocowun, Chris. “Kony Invites Four Lawyers.” *New Vision*. November 11, 2006. <http://allafrica.com/stories/200611120009.html> Accessed March 25, 2019.

<sup>236</sup> Bigombe played a prominent role in the informal talks leading to the Juba Peace Process because she was the lead negotiator in the most successful formal peace negotiations between the LRA and the GoU up to that point. Those negotiations took place in 1994, and in the subsequent decade, Bigombe maintained sporadic contacts with LRA leaders.

because of the ICC warrants.<sup>237</sup> The warrants coincided with South Sudan's attempt to set up an independent government, apart from the Sudanese government in Khartoum. The LRA's continued presence in southern Sudan made it extremely difficult for South Sudan's government to maintain security. Therefore, in the last months of 2005, South Sudan began to work with the LRA on laying the groundwork for peace negotiations with the GoU, in hope that LRA fighters could return home.<sup>238</sup>

That the LRA was no longer welcome as a military force in South Sudan had important implications for its five leaders who were wanted by the ICC. Neither South Sudan nor Sudan were parties to the Rome Statute, which was an important reason why they maintained safe havens for the LRA. Uganda, as a party to the Rome Statute, was legally obligated to arrest anyone wanted by the ICC, and either prosecute them domestically, or turn them over to the Court for prosecution. Therefore, as long as Kony and the other leaders remained in their bases in South Sudan, they were safe from ICC prosecution, but if they were apprehended within Uganda, they risked being turned over to the Court. There was no way for them to return to Uganda without risking ICC prosecution.

During the fall of 2005, local and international human rights advocates continued to publicly question the Court's involvement in Uganda and contradict the Rome Statute's normative commitments. In a September 2005 report, Human Rights Watch (HRW) wrote

Many traditional, civic and religious leaders as well as civil society groups in northern Uganda have opposed the ICC investigation on the grounds that it undermines the peace process and will lead to increased violence against civilians. They have instead advocated amnesty for all

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<sup>237</sup> Branch, "Uganda's Civil War and the Politics of ICC Intervention," p. 184

<sup>238</sup> Tripp, *Museveni's Uganda*, p. 168

members of the LRA, including the top leaders who would be the individuals the ICC would most likely investigate and prosecute.

Opposition to the ICC also stems from the perception among many northerners that it will only investigate the LRA and not government forces despite the UPDF's long record of abuses. The ICC is to blame for such perceptions: it has failed to undertake an effective outreach strategy to actively engage civil society and the general population in northern Uganda to explain its mandate and the scope of its inquiry. Despite its shortcomings, however, the ICC remains the best option for achieving some measure of justice and ending impunity for the people of northern Uganda.<sup>239</sup>

While HRW itself maintained support for the Rome Statute's normative commitments, and showed conditional support for the Court's involvement in Uganda, local civil society groups took a more explicitly critical stance. HRW recognized the importance of promoting Rome Statute norms to local civil society groups, and urged the ICC to do more on this front. Still, it is important to note that from almost the beginning of the Court's involvement in northern Uganda, local civil society groups were not only highly critical of its actions, but skeptical of the anti-impunity norms it promoted. International human rights advocates, such as HRW and ICG,<sup>240</sup> maintained conditional support for the ICC's specific actions, and unconditional support of the Rome Statute's anti-impunity norms.

The LRA and the government of South Sudan collaborated on an initial proposal for a peace agreement with the GoU. Kony personally reached out to NGO representatives for support during the anticipated peace process.<sup>241</sup> On February 12, Vincent Otti, the LRA's second-in-command after Kony, told Schomerus, who the LRA

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<sup>239</sup> "Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda." *Human Rights Watch*. September 20, 2005. <https://www.hrw.org/report/2005/09/20/uprooted-and-forgotten/impunity-and-human-rights-abuses-northern-uganda#> Accessed March 25, 2019

<sup>240</sup> "A Strategy for Ending Northern Uganda's Crisis." *International Crisis Group*. January 11, 2006. <https://www.crisisgroup.org/africa/horn-africa/uganda/strategy-ending-northern-ugandas-crisis> Accessed March 25, 2019

<sup>241</sup> Assefa, Hizkias. 2010. "Civil Society Engagement: the role of Pax Christi in the Juba process" in *Initiatives to end the violence in northern Uganda: 2002-09 and the Juba peace process* ed by Elizabeth Drew. London, UK: Conciliation Resources, p. 15

had come to trust, that the LRA wanted to talk peace, but only after the presidential elections at the end of the month, as he did not want Museveni to use the prospect of peace talks to bolster his re-election campaign.<sup>242</sup> As motivated as the LRA was to build a peace, they remained extremely suspicious of Museveni and his administration.

To the LRA's disappointment, Museveni won re-election by a margin of 59%.<sup>243</sup> Shortly after, the government of Sudan reached out to the LRA, attempting to re-establish their old alliance, but the LRA rebuffed them.<sup>244</sup> Close ties with Sudan would not have bolstered the GoU's trust in the LRA, given how Sudan had used its past support of the LRA to destabilize Uganda.

As the LRA continued to collaborate with Southern Sudan on a prospective peace agreement, Thomas Lubanga Dyilo became the first person to be arrested on an ICC warrant and turned over to the Court.<sup>245</sup> Like the LRA leaders, Lubanga was a rebel leader accused of war crimes, whose case had been referred to the Court by the government he fought against. His arrest was an important signal to the world, and no doubt to the LRA, of the Court's power to constrain exit options, and of the reality that an ICC arrest warrant represented a credible threat to leaders' exit options.

Still, on May 2, Kony and Riek Machar, the Vice President of South Sudan, met to discuss peace talks. Machar paid \$20,000 in exchange for the meeting, which was broadcast internationally.<sup>246</sup> The LRA continued to reach out to civil society

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<sup>242</sup> Schomerus, Marieke. "Chasing the Kony Story" p. 4-5

<sup>243</sup> Tripp, *Museveni's Uganda*, p. 142

<sup>244</sup> Schomerus, Marieke. 2007. "The Lord's Resistance Army in Sudan: A History and Overview." Geneva, Switzerland: Small Arms Survey, Graduate Institute of International Studies, p. 25

<sup>245</sup> "Congo-Kinshasa: ICC Arrests Its First War Crimes Suspect." *Hirondelle News Agency*. March 20, 2006. <http://allafrica.com/stories/200603220096.html> Accessed March 25, 2019.

<sup>246</sup> Schomerus, "The Lord's Resistance Army in Sudan: A History and Overview." p. 34

organizations and the media to publicize its case, turning to Schomerus to arrange an interview with the BBC.<sup>247</sup>

Meanwhile, the GoU announced its willingness to attend peace talks with the LRA. Immediately upon the announcement, the ICC publicly reminded Uganda of its obligation to detain and prosecute the five wanted LRA leaders, and Uganda promised that it would uphold its obligations to the Court.<sup>248</sup> With this statement, the Court definitively cast itself in a prosecutorial role, and showed that its priority in the Juba peace process was not so much ensuring post-conflict justice as it was insuring the prosecution of indicted LRA leaders. No doubt in part due to the ICC's public statements, the LRA leaders continued to be extremely nervous about leaving their camps to engage in formal negotiations, although they invited South Sudanese representatives, and civil society representatives, into their camps to discuss peace, and promised to send a delegation to any talks.<sup>249</sup> Finally, at the onset of the actual formal negotiations, Kony declared that he would not sign any final peace agreement and disarm until he was guaranteed immunity from ICC arrest warrants.<sup>250</sup>

The LRA's behavior in this time period does not correspond with the conventional expectation that ICC arrest warrants alone create a fear of apprehension that prevents rebels from engaging in peace negotiations. Indeed, it shows that the LRA leaders' desires to respond to the ICC warrants and neutralize the threat that the ICC posed to their exit options spurred the LRA's increased engagement in peace

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<sup>247</sup> Schomerus, Marieke. "Chasing the Kony Story" p. 5

<sup>248</sup> "New Peace Bid With LRA Won't Deter Quest for Justice - ICC." *UN Integrated Regional Information Networks*. June 14, 2006. <http://www.irinnews.org/news/2006/06/14/new-peace-bid-lra-wont-deter-quest-justice-icc> Accessed March 25, 2019.

<sup>249</sup> Schomerus, "The Lord's Resistance Army in Sudan: A History and Overview." p. 35

<sup>250</sup> "Uncertain Delay in Juba Peace Process." *Justice and Peace News: Newsletter of the Justice and Peace Commission of the Archdiocese of Gulu*. April 2008 [https://www.c-r.org/downloads/JPCNewsletter\\_200804\\_ENG.pdf](https://www.c-r.org/downloads/JPCNewsletter_200804_ENG.pdf), Accessed March 25, 2019. p. 6.

negotiations. The LRA relied on the same outsiders to understand its options vis a vis the ICC and to help arrange peace talks with the Ugandan government. This evidence also suggests that the LRA sought a complex understanding of the ICC, and that it had months of conversations with informed outsiders specifically on the topic of the ICC arrest warrants. Indeed, it was the combination of the LRA's fear of the Court and its growing understanding of the possibility of using peace negotiations to avoid arrest and trial at the Hague that propelled it toward the negotiating table.

Museveni, aware that the LRA leaders were hesitant about appearing personally at peace talks, and aware of Kony's pronouncement that he would not sign any peace agreement until granted immunity from ICC prosecution, announced that the GoU was willing to grant amnesty to Kony and the four other wanted LRA leaders if they "respond[ed] positively to the talks with the government in Juba, southern Sudan, and abandon[ed] terrorism."<sup>251</sup> With this pronouncement, Uganda directly reneged on its commitment to the Rome Statute, and set its stance on post-conflict justice in direct contradiction to the ICC. In response, the ICC publically reminded Uganda of their Rome Statute commitment to arrest leaders wanted by the ICC, thus heightening Uganda's uneasy stance.<sup>252</sup>

The GoU intended to use the threat of ICC prosecution as a stick, and the promise of amnesty as a carrot, to gain leverage over the LRA in negotiations, and held that it would only finalize its position on post-conflict justice "only upon the LRA's signature

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<sup>251</sup> "New Peace Bid With LRA Won't Deter Quest for Justice - ICC." *UN Integrated Regional Information Networks*.

<sup>252</sup> Ibid.



and implementation of the agreement.”<sup>253</sup> However, the LRA remained extremely aware that any GoU assurance of amnesty was completely conditional, and that due to the outstanding ICC arrest warrants, its leaders could be legally and legitimately arrested and turned over to the Court in spite of any promises of amnesty. Again, this awareness was not solely due to the fact that the ICC issued arrest warrants, but also due to the ICC’s public messaging that they were committed specifically to prosecuting LRA leaders, instead of simply promoting justice broadly.

### **5.3 The outcome of the Juba Peace Process**

It was in this climate of mistrust and uncertainty that the Juba peace talks officially began on July 14, 2006. The delegations quickly agreed on a five part negotiating agenda, comprising “1) cessation of hostilities; 2) comprehensive political solutions; 3) justice and accountability; 4) demobilization, disarmament and reintegration (DDR); 5) a permanent ceasefire.”<sup>254</sup> Kony entered talks saying that he would not sign any peace agreement while the ICC warrants were still out for LRA leaders. In these early days of peace talks, the GoU repeated its promise that the ICC would not prosecute top LRA commanders, only to withdraw that statement four days later.<sup>255</sup>

On August 26, the delegations agreed to a settlement on the first order of business, a cessation of hostilities. However, this agreement quickly fell apart, and the LRA resumed attacks on civilians. Almost immediately upon attempting to implement the cessation of hostilities, the LRA delegates conveyed Kony’s apprehensions that his

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<sup>253</sup> Afako, Barney. 2010. “Negotiating peace in the shadow of justice” in *Initiatives to end the violence in northern Uganda: 2002-09 and the Juba peace process* ed by Elizabeth Drew. London, UK: Conciliation Resources, p. 21

<sup>254</sup> Schomerus, Marieke and Betty Acan Ogwero. 2010. “Searching for solutions in Juba: an overview” in *Initiatives to end the violence in northern Uganda: 2002-09 and the Juba peace process* ed by Elizabeth Drew. London, UK: Conciliation Resources, p. 10

<sup>255</sup> New Times 4 August 2006

post-conflict fate remained uncertain, and that the GoU did not seem willing to negotiate a clear, firm compromise on this matter.<sup>256</sup>

Two weeks later, USAID released an influential report calling for a two-pronged post-conflict justice strategy: amnesty for low-level combatants, and prosecution for leaders. There was, conspicuously, no mention of the ICC, except to say that “the design of the process [should] include the needs of the victims themselves rather than exclusively incorporate the opinions of elite groups.”<sup>257</sup> At the same time, ICG released a report that showed a dramatic shift from their past support for the ICC’s role in the conflict situation.<sup>258</sup> The report suggested that negotiators at Juba consider offering amnesty to LRA leaders in a state that was not a party to the Rome Statute as a way of removing the threat of prosecution at the ICC.<sup>259</sup> The ICG suggested that this would be a way for negotiators to circumvent the fact that only the ICC or the UN Security Council could lift ICC warrants against the indicted leaders while also meeting Kony’s condition that he would not sign any peace agreement until he was immune from ICC prosecution. In making this suggestion, the ICG respected the ICC’s institutional mandate and structure, but deeply contracted the anti-impunity norms of the Rome Statute. This suggestion also explicitly frames the ICC not as a promoter of post-conflict justice, but a potential conflict spoiler that needed to be neutralized.

In the following months, Kony invited a team of lawyers to his camp outside of Juba so that he could learn more about the ICC and his chances of arrest and

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<sup>256</sup> Schomerus and Ogwero. “Searching for solutions in Juba: an overview” p. 12

<sup>257</sup> USAID. 2006. “Analysis of Lessons Learned from Past Efforts to End the Conflict in Northern Uganda.” Contract No. 623-I-00-03-00048-00 / Task Order 002

<sup>258</sup> “Peace in Northern Uganda: Decisive Weeks Ahead.” *International Crisis Group*. February 21, 2005. <https://www.crisisgroup.org/africa/horn-africa/uganda/peace-northern-uganda> Accessed March 25, 2019.

<sup>259</sup> Ibid.

prosecution.<sup>260</sup> Kony attempted to discuss the ICC warrants with many international representatives he met, including the UN Undersecretary for Humanitarian Affairs Jan Egeland.<sup>261</sup> Notably, in this meeting, Egeland refused to discuss the ICC, as he “tried to make the alternative to continued war and terror as attractive as possible.”<sup>262</sup> Kony declared that, as long as the threat of arrest on an ICC warrant remained, he would not authorize the LRA to rejoin talks.<sup>263</sup> He took this firm stance in spite of the GoU’s offers of amnesty, clearly indicating his understanding that these offers lacked credibility.

The contrast between the LRA’s initiative in collaborating with the government of Southern Sudan to bring about the Juba process and its total refusal to continue peace talks after the Ugandan government offered the prospect of amnesty yet retained the threat of ICC prosecution could not be starker. It clearly demonstrates how crucial the state’s positioning on post-conflict justice is to perceptions of its credibility and commitment to peace talks, and how the presence of ICC arrest warrants limits the positions that the state can credibly take. The ICC’s public statements only heightened this dynamic—ICC reminders that amnesty was unacceptable only deepened the LRA’s mistrust of Uganda, and decreased LRA agency in negotiations.

Kony’s refused to continue talks after the GoU declined to set a clear position on post-conflict justice that credibly addressed the outstanding ICC warrants. This showed his awareness that the GoU’s promises of amnesty could not be trusted not only because of potential GoU government duplicity, but because he knew that as long as an ICC

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<sup>260</sup> Ocowun, Chris. “Kony Invites Four Lawyers.” *New Vision*. November 11, 2006. <http://allafrica.com/stories/200611120009.html> Accessed March 25, 2019.

<sup>261</sup> “Interview: Jan Egeland.” *Conciliation Resources*. 2010. [https://www.c-r.org/downloads/11s\\_8Interview-Jan%20Egeland\\_2010\\_ENG.pdf](https://www.c-r.org/downloads/11s_8Interview-Jan%20Egeland_2010_ENG.pdf) Accessed March 25, 2019.

<sup>262</sup> Ibid.

<sup>263</sup> Acana, Rwot David Onen. 2010. “Acholi civil society engagement in Juba” in *Initiatives to end the violence in northern Uganda: 2002-09 and the Juba peace process* ed by Elizabeth Drew. London, UK: Conciliation Resources, p. 17

warrant remained for him and his comrades, they were liable to be arrested and turned over to ICC for prosecution. It was precisely the GoU's refusal to adequately address this issue, and the LRA's perceived constraints on negotiating, that led Kony to demand a boycott of LRA participation in the Juba peace talks.

In early 2007, the UN appointed a Special Envoy to the LRA conflict in the hopes of resuscitating the Juba peace talks.<sup>264</sup> The Envoy, Joaquim Chissano, held several meetings with the LRA in their camps throughout April. These meetings culminated in a meeting of an LRA and Ugandan delegation in the Ri-Kwabanga clearing.<sup>265</sup> There, the LRA declared its willingness to return to talks as long as its security was assured, and as long as there was oversight from several African states.<sup>266</sup> The next day, the parties announced they would reinstate the cessation of hostilities and that they would enhance the monitoring team.<sup>267</sup>

The second round of Juba peace talks began on April 27.<sup>268</sup> Upon commencement of the talks, the ICG publicly said that ICC involvement in Uganda should continue.<sup>269</sup> Two months later, the GoU and the LRA signed the Agreement on Accountability and Reconciliation. The Agreement provided for the domestic prosecution of LRA leaders, and was thus aligned with Uganda's Rome Statute commitments. However, international human rights advocates expressed concerns about the leniency of these domestic

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<sup>264</sup> Schomerus, "The Lord's Resistance Army in Sudan: A History and Overview." p. 38

<sup>265</sup> *ibid*

<sup>266</sup> *ibid*

<sup>267</sup> "Uganda: Resumption of Juba Peace Talks Welcome." *Human Rights Watch*. April 26, 2007. <http://www.hrw.org/news/2007/04/25/uganda-resumption-juba-peace-talks-welcome> Accessed March 25, 2019.

<sup>268</sup> Schomerus, "The Lord's Resistance Army in Sudan: A History and Overview." p. 38

<sup>269</sup> "Northern Uganda: Seizing the Opportunity for Peace" *International Crisis Group*. April 26, 2007. <https://www.crisisgroup.org/africa/horn-africa/uganda/northern-uganda-seizing-opportunity-peace> Accessed March 25, 2019.

prosecution mechanisms.<sup>270</sup> For instance, Article 5.3 of the treaty provided for “alternative justice mechanisms” such as “traditional justice mechanisms” and “alternative sentences,” which, since they are not specified, could be more lenient procedures than those prescribed by the Rome Statute.<sup>271</sup> In any case, the Agreement was a strong signal that Uganda intended to use domestic justice mechanisms to prosecute the LRA, and an even stronger signal that it understood the importance of upholding its commitments to the Rome Statute. Indeed, the Ugandan government went about creating the domestic justice mechanisms necessary to execute the Agreement in accordance with the Rome Statute, including establishing a War Crimes division of its High Court in 2008.<sup>272</sup> Even upon the completion of this agreement, Conciliation Resources, a prominent international consortium for peacemakers, released a report saying that the ICC has been an obstacle to the Juba Peace Process.<sup>273</sup>

The Juba peace process continued smoothly throughout the end of summer and into the autumn of 2007. This, coupled with the LRA’s acceptance of the Agreement on Accountability on Reconciliation, and the fact that its ICC arrest warrants still stood, demonstrate that it is not the mere threat of prosecution, or even international prosecution, that deters rebel groups from committing themselves to peace negotiations. Throughout this period, the LRA understood that the ICC arrest warrants still stood, and understood that they were still liable to be prosecuted once the peace agreement had been

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<sup>270</sup> “Uganda: Resumption of Juba Peace Talks Welcome.” *Human Rights Watch*.

<sup>271</sup> Agreement on Accountability and Reconciliation between the government of the Republic of Uganda and the Lord's Resistance Army/Movement. June 27, 2007.. <http://www.ucdp.uu.se/gpdbase/peace/Uga20070629.pdf>

<sup>272</sup> Otim, M., & Wierda, M. “Uganda: Impact of the Rome Statute and the International Criminal Court.” *The Rome Statute Review Conference*. 2010. <https://www.ictj.org/sites/default/files/ICTJ-Uganda-Impact-ICC-2010-English.pdf>, p. 5 Accessed March 18, 2015.

<sup>273</sup> “Submissions on the Prospects for Peace in Uganda.” *Conciliation Resources*. July 2007. [https://www.c-r.org/downloads/SubmissionsProspectsforPeaceinUganda\\_200707\\_ENG.pdf](https://www.c-r.org/downloads/SubmissionsProspectsforPeaceinUganda_200707_ENG.pdf), Accessed March 25, 2019. p.

signed. They had confidence in the negotiating process not because they were assured protection from prosecution, but because the Ugandan government made an unprecedented, credible, specific agreement on post-conflict justice. This agreement corresponded with its commitment to the ICC, which heartened international observers' faith in the peace process, but did not dissuade the LRA from continuing to participate.

However, the ICC never definitively signaled that it would accept the justice mechanisms outlined in the Agreement on Accountability and Reconciliation and international human rights advocates questions whether it actually corresponded with the Rome Statute.<sup>274</sup> Therefore, the ICC arrest warrants were still a major factor in the peace process. Undermining stances from both local and international human rights advocates heightened the ICC's ongoing prosecutorial presence. For example, as the Agreement on Accountability and Reconciliation was signed, ICG issued another report saying that amnesty in non-Rome Statute signatory countries should be an option for LRA leaders, and that ICC arrest warrants should only be acted upon as an absolute last resort.<sup>275</sup> ICG again framed this as a way of respecting the mandate of ICC, but the idea of amnesty for LRA leaders inevitably contradicts the norms of the Rome Statute. Further, in framing the Court's role not as a promoter of justice, but as a complicating factor in the peace process, stances like this further affirmed the ICC's prosecutorial role.

The LRA's internal power dynamics soon became so contentious as to further derail the peace process. In November 2007, Kony executed Vincent Otti, his second-in-command, because he disagreed with Otti's approach to the peace process, and

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<sup>274</sup> Uganda: Resumption of Juba Peace Talks Welcome." *Human Rights Watch*.

<sup>275</sup> "Northern Uganda Peace Process: The Need to Maintain Momentum." *Human Rights Watch*. September 14, 2007. <https://www.crisisgroup.org/africa/horn-africa/uganda/northern-uganda-peace-process-need-maintain-momentum> Accessed March 25, 2019.

particularly his trust in international mediators.<sup>276</sup> The following January, Kony fired the LRA's lead negotiator, as well as three other members of the negotiating team, because they remained too loyal to Otti.<sup>277</sup> Kony designated a new delegation, which some observers felt were "negotiators for hire."<sup>278</sup> Peace talks resumed a week later.<sup>279</sup>

The LRA and Ugandan delegations quickly signed a new ceasefire, and the new head of LRA's negotiating team expressed remarkable optimism about the negotiations' prospects for success. He told an observer "when a peace agreement is signed by the end of February, the LRA will cease to exist."<sup>280</sup> However, beyond this statement, all other evidence from the time suggests that the LRA was determined to continue to exist, peace agreement or no. This statement corroborated observers' concerns that the new LRA delegation did not truly represent the concerns of their leadership, and that they were not in close enough contact with the LRA central command to represent their wishes. These concerns were further corroborated by press reports that Kony continued to say that he would never appear to sign a peace agreement until the ICC warrants were withdrawn.<sup>281</sup>

After three weeks of discussions, the LRA and the GoU signed an Annexure to the previous Agreement on Accountability and Reconciliation. The Annexure specified that senior LRA leaders who ordered the commission of atrocities would be tried in

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<sup>276</sup> Smock, David. 2008. "Uganda/Lord's Resistance Army Peace Negotiations: An Update from Juba." *United States Institute of Peace*. <http://www.usip.org/publications/ugandalords-resistance-army-peace-negotiations>, p. 2

<sup>277</sup> Ibid

<sup>278</sup> Interview 3095

<sup>279</sup> Smock, "Uganda/Lord's Resistance Army Peace Negotiations: An Update from Juba.", p. 3

<sup>280</sup> Smock, "Uganda/Lord's Resistance Army Peace Negotiations: An Update from Juba." p. 2

<sup>281</sup> "Chronology of Recent Events." *Justice and Peace News: Newsletter of the Justice and Peace Commission of the Archdiocese of Gulu*. April 2008 [https://www.c-r.org/downloads/JPCNewsletter\\_200804\\_ENG.pdf](https://www.c-r.org/downloads/JPCNewsletter_200804_ENG.pdf), Accessed March 25, 2019. p. 11

Ugandan courts, while LRA soldiers would undergo traditional northern Ugandan justice mechanisms of reconciliation and reintegration.<sup>282</sup>

The ICC welcomed the Annexure, which upheld Uganda's commitment to the Rome Statute, but also specified that Uganda's domestic prosecutions would have to meet its standards of legitimacy to fulfill the Court's doctrine of complementarity.<sup>283</sup> Again, by reminding the parties of their Rome Statute obligations, the ICC showed that it prioritized a specific form of prosecution over justice more broadly. Further, the parties never came to a consensus on specific measures to ensure that domestic prosecutions rose to the ICC's standards. This meant that LRA leaders' exit options remained uncertain, and showed that the ICC stood to threaten their exit options even if they succeeded in negotiating a domestic justice alternative with the GoU.

Shortly after the Annexure was signed, the parties began working on a provision to allow LRA leaders to be tried in Uganda.<sup>284</sup> AI quickly criticized this provision for contradicting the Rome Statute and undermining the ICC, saying

it would be up to the Pre-Trial Chamber of the ICC to decide whether Ugandan courts are able and willing to genuinely investigate and prosecute the LRA suspects named in the warrants. Amnesty International has called for LRA members charged with crimes under international law to be surrendered to the International Criminal Court (ICC) immediately.<sup>285</sup>

Although this statement supports the Rome Statute's anti-impunity norms, it also starkly casts the ICC in the role of prosecutor. Indeed, in taking this position, AI accentuates the Court's emphasis on the international prosecution, rather than on promoting post-conflict

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<sup>282</sup> Smock, "Uganda/Lord's Resistance Army Peace Negotiations: An Update from Juba." p. 1

<sup>283</sup> Afako, Barney. 2010. "Negotiating peace in the shadow of justice" in *Initiatives to end the violence in northern Uganda: 2002-09 and the Juba peace process* ed by Elizabeth Drew. London, UK: Conciliation Resources, p. 22-23

<sup>284</sup> "Uganda strikes deal with LRA on trials." *Amnesty International*. February 20, 2008.

<https://www.amnesty.org/en/latest/news/2008/02/uganda-strikes-deal-lra-trials-20080220/> Accessed March 25, 2019.

<sup>285</sup> Ibid.



accountability more broadly. In this emphasis, and especially in supporting international prosecution during a political moment when the rebels and the state were attempting to design an alternate justice mechanism, this position deepens the ICC's role as spoiler.

Nonetheless, as the negotiations continued over the subsequent months, "justice was not on the agenda."<sup>286</sup> Afako, a member of the GoU negotiating team, and Hottinger, a Swiss mediator, recall that, in the subsequent months, the LRA delegation seemed increasingly divorced from the LRA leadership, and Kony only made rare appearances. They both trace the shift to the execution of Vincent Otti, and some observe that the new delegation was more interested in the credential of having successfully negotiated a peace agreement than representing the LRA's interests.<sup>287</sup>

In the spring of 2008, the LRA continued to negotiate to try to get ICC warrants removed. On March 10, a legal team working for the LRA met with the ICC to discuss procedural issues about the Uganda case,<sup>288</sup> and two days after that meeting, the ICC requested more information from the Ugandan government on the special courts that would try the LRA leaders in lieu of ICC prosecution.<sup>289</sup> Still, the ICC never affirmed that it would accept these courts as credible alternatives to international prosecution.

Complicating matters, on the same day, President Museveni said that he could "save" LRA leaders from prosecution once they signed the final peace deal.<sup>290</sup> Such a statement flies in the face of how leaders can use the peace process to avoid ICC prosecution: in order to do so, once the ICC has issued arrest warrants, leaders need to

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<sup>286</sup> Afako, "Negotiating peace in the shadow of justice," p. 23

<sup>287</sup> Interview 3095 and Interview 3164

<sup>288</sup> "Chronology of Recent Events." *Justice and Peace News: Newsletter of the Justice and Peace Commission of the Archdiocese of Gulu*. April 2008 [https://www.c-r.org/downloads/JPCNewsletter\\_200804\\_ENG.pdf](https://www.c-r.org/downloads/JPCNewsletter_200804_ENG.pdf), Accessed March 25, 2019. p. 11

<sup>289</sup> Ibid.

<sup>290</sup> Ibid.

use the peace process to design an alternative domestic justice system that the ICC deems to be a credible, legitimate alternative to international prosecution. No state has the power to “save” a leader from an international arrest warrant, and if the peace process did not yield an ICC-approved alternative justice mechanism, President Museveni simply could have arrested LRA leaders on the ICC warrant before the ink was even dry on the peace deal. Therefore, throughout the spring, LRA leaders continued to insist that they would not sign a peace deal until ICC warrants were removed,<sup>291</sup> but also indicated that they would be willing to be held accountable in a northern Ugandan venue.<sup>292</sup>

Notably, these efforts corresponded with domestic Ugandan efforts to circumvent the ICC. On March 6, a coalition of Ugandan legislators and civil society organizations released a statement calling for the UN Security Council to suspend the ICC arrest warrants for LRA leaders.<sup>293</sup> They framed this step as part of a necessary, longer-term plan for definitively solving the LRA problem, again indicating that human rights and peace advocates in Uganda approached the ICC not so much as a justice-promoting institution, but as a body bent on advancing international prosecutions, even if it meant spoiling peace negotiations.

Then, in April 2008, Kony failed to appear at a planned signing of a more complete peace agreement, and a few days later, the LRA attacked civilians.<sup>294</sup> Nonetheless, the delegations attempted to negotiate peace for several months, even as Kony refused to attend more signings, saying that he refused to turn himself in and “be

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<sup>291</sup> Ibid.

<sup>292</sup> “Uganda Starts PRDP.” *Justice and Peace News: Newsletter of the Justice and Peace Commission of the Archdiocese of Gulu*. June 2008 [https://www.c-r.org/downloads/JPCNewsletter\\_200806\\_ENG\\_0.pdf](https://www.c-r.org/downloads/JPCNewsletter_200806_ENG_0.pdf), Accessed March 25, 2019. p. 7.

<sup>293</sup> “Chronology of Recent Events.” *Justice and Peace News: Newsletter of the Justice and Peace Commission of the Archdiocese of Gulu*. April 2008 [https://www.c-r.org/downloads/JPCNewsletter\\_200804\\_ENG.pdf](https://www.c-r.org/downloads/JPCNewsletter_200804_ENG.pdf), Accessed March 25, 2019. p. 11

<sup>294</sup> Green, *The wizard of the Nile*, p. 232

hanged.”<sup>295</sup> Riek Machar, the Chief Mediator, attempted unsuccessfully to meet with Kony that summer.<sup>296</sup> At this point, LRA leadership became even more separated from the people representing them at peace negotiations, with even Joaquim Chissano, the Special Envoy that the UN appointed to oversee the peace process, commenting, “There is a lack of communication, and that is what the LRA leader wants. There are people who are assisting in establishing that effective communication, and once that clarification is made the peace process will be back on the road.”<sup>297</sup>

These setbacks were accompanied by increasing local civil society criticism of the ICC’s role in the peace process. In April 2008, after Kony failed to appear for the signing of the peace agreement, the Justice and Peace Commission for the Archdiocese of Gulu, a very influential northern Ugandan civil society organization, released a newsletter that said that northern Ugandans overwhelmingly supported the lifting of ICC warrants against LRA leaders because they perceived them to be an obstacle to the peace process.<sup>298</sup>

The negotiators continued to frame a peace agreement with the involvement of the LRA delegation, but without Kony. Further, on May 24, the ICC released a public statement calling on the GoU to intensify their efforts to arrest LRA leaders.<sup>299</sup> This kind of statement is perhaps the starkest example possible of the ICC playing a prosecutorial

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<sup>295</sup> Atkinson, *From Uganda to the Congo and Beyond: Pursuing the Lord's Resistance Army*, p. 19

<sup>296</sup> Ibid.

<sup>297</sup> “Peace Talks Not Dead.” *Justice and Peace News: Newsletter of the Justice and Peace Commission of the Archdiocese of Gulu*. April 2008 [https://www.c-r.org/downloads/JPCNewsletter\\_200804\\_ENG.pdf](https://www.c-r.org/downloads/JPCNewsletter_200804_ENG.pdf), Accessed March 25, 2019. p. 1

<sup>298</sup> “Uncertain Delay in Juba Peace Process.” *Justice and Peace News: Newsletter of the Justice and Peace Commission of the Archdiocese of Gulu*. April 2008 [https://www.c-r.org/downloads/JPCNewsletter\\_200804\\_ENG.pdf](https://www.c-r.org/downloads/JPCNewsletter_200804_ENG.pdf), Accessed March 25, 2019. p. 6

<sup>299</sup> “Chronology of Recent Events.” *Justice and Peace News: Newsletter of the Justice and Peace Commission of the Archdiocese of Gulu*. June 2008 [https://www.c-r.org/downloads/JPCNewsletter\\_200806\\_ENG\\_0.pdf](https://www.c-r.org/downloads/JPCNewsletter_200806_ENG_0.pdf), Accessed March 25, 2019. p. 11.

role—in a political moment when peace negotiations progress was stalled because leaders would not engage for fear of arrest, instead of promoting efforts to ensure that these leaders are held accountable after the conflict, the ICC instead publicly insisted that military efforts to capture and turn them over to the Hague be intensified. The very next day, the Ugandan press reported that Kony said he would not sign the peace agreement.<sup>300</sup>

Negotiators communicated to Kony that he had until November 30 to sign the agreement.<sup>301</sup> Kony never appeared at peace talks during this time, in spite of giving a radio interview in June of 2008 announcing his intentions to appear at talks and immediately restart the peace process.<sup>302</sup> At the same time, the UN Security Council held a meeting discussing the situation in northern Uganda, where HRW publicly urged them to support the arrest of LRA leaders on an ICC warrant.<sup>303</sup> Perhaps unsurprisingly in light of these conversations, LRA leaders never went back to the peace negotiations. Negotiators arranged a meeting for November 30 in the Ri-Kwabanga clearing, and Kony never appeared. The Juba peace process was over.

The fact that the Agreement on Accountability and Reconciliation spurred the LRA's confidence in negotiations and catalyzed their more active participation in the peace process for almost a year shows that even the ICC arrest warrants will not deter leaders from participating in peace negotiations if they perceive them to be an opportunity to neutralize the threat of ICC prosecution. The ICC's critiques of this agreement corresponded with declining LRA engagement in the peace process as a

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<sup>300</sup> Ibid.

<sup>301</sup> Ibid.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid.

whole, which shows that ICC signaling that it will not accept alternatives to international prosecution is the necessary condition that deters leaders from engaging in the peace process.

## **6.0 The implications for theory**

Attempts to make peace between the LRA and the GoU clearly show the complex and varying role that the ICC plays in peace negotiations to end civil wars. Efforts to bring the LRA to the negotiating table from 2002 to 2005 clearly show that the threat of prosecution from the ICC does not necessarily dissuade rebels from negotiating peace. This shows that the latent threat of prosecution can propel leaders to the negotiating table, because rebels who understand the principle of complementarity and who see the Court playing an oversight, rather than prosecutorial, role, understand that peace negotiations can be used to remove a latent threat to their post-conflict exit options. Indeed, the LRA's varying responses to attempts to start peace negotiations from 2002 to 2004 show that, even though the Court was forming and the GoU was very public about its intention to prosecute LRA leaders, the fact that the Court only represented a latent threat of prosecution meant that it did not prevent LRA leaders from coming to the negotiating table. Then, in 2005, the LRA's efforts to learn about the Court both before and after arrest warrants were issued, and the way these efforts coincided with LRA outreach to peacemakers more broadly, show that even if rebel leaders understand that the specter of prosecution could threaten their post-conflict exit options, if they understand the threat of prosecution to be latent, and potentially neutralized by engaging in peace negotiations, the prospect of prosecution—even arrest warrants—will not deter them from arriving at the negotiating table, and might actually propel them further towards negotiations.

During formal peace negotiations, however, the ICC had a very different effect. The parties' repeated failed attempts to create a post-conflict justice framework that satisfied the ICC—and the Court's willingness to repeatedly and publicly air its dissatisfaction, and call for the arrest of leaders—meant that the Court assumed the role of a prosecutor rather than an overseer, and fomented deep LRA distrust in the negotiating process. The ICC's assumption of the role of prosecutor, again, was not simply a result of the formal legal status of its involvement in Uganda, nor on the issuing of arrest warrants. Rather, it was a function of several factors: the issuing of arrest warrants, the aggressive approach taken by Prosecutor Moreno-Ocampo, and the public messaging of human rights organizations and other mediators that undermined the normative commitment to prevent impunity. The fact that the Court was an increasingly aggressive and increasingly isolated proponent of prosecution meant that it represented a credible threat to leaders' exit options, which undermined their trust in the peace process.

The LRA's increasing distrust of the peace process was reflected in the LRA's internal politics when the LRA's leader executed one of his most powerful commanders for being too open to international mediators. With this event, the LRA's most suspicious and disenfranchised faction won out. This event coincided with repeated, public ICC criticisms of the post-conflict justice provisions of the peace accord, thus further confirming fears that the ICC, in its prosecutorial role, would make LRA leaders' post-conflict exit options worse.

Another important dynamic emerges from this case. The Court's increasing assumption of a prosecutorial, rather than an oversight, role was compounded by Uganda's varying stances throughout the peace negotiations. Uganda's varying stances

on post-conflict justice heightened the post-conflict threat to leaders' fates that the ICC could have posed, because after any peace agreement was signed, Uganda would not only be legally able to arrest LRA leaders and turn them over to the ICC for prosecution, they would be legally obligated by the Rome Statute to do so. Uganda's varying stances on amnesty for LRA leaders, combined with the ICC's repeated public reminders that it would not accept amnesty as an option, left open the possibility that LRA leaders could be granted amnesty in a peace agreement but still be arrested by the GoU on an ICC warrant after they had put down arms. This was an unacceptable possibility for LRA leaders, and one more reason why the ICC's prosecutorial role made it more rational for them to continue the fight than continue to talk peace.

Further, the existence of the ICC warrants, and the ICC's public reminders of Rome Statute obligations, heightened the reality that LRA leaders could have been arrested on these warrants at any point during the peace process. This uncertainty led LRA leadership to stay physically removed from the talks, which created space for a negotiating team that did not seem to either understand or deeply care about the LRA's interests. No LRA leader with a long history or stake in the talks was comfortable attending them for fear of arrest and prosecution, thus consigning the LRA delegation to a sub-par negotiating team. Thus, although the LRA delegation managed to negotiate a comprehensive peace deal, the LRA leadership itself refused to sign it, as it did not represent their interests.

## **7.0. The LRA and the ICC after Juba**

After the Juba Peace Process ended, and after the LRA had resumed the fight, the fear that had first propelled LRA leaders to and later repelled them from the table began to

come to pass. The ICC issued arrest warrants for five LRA leaders: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen. The Court terminated proceedings against Lukwiya during the Juba Peace Process, when reports of his death in battle in 2006 were confirmed.<sup>304</sup> Recall that Vincent Otti was executed during the Juba Peace Process, on the orders of Joseph Kony, due to a dispute about how the LRA should approach the peace process.<sup>305</sup>

After the Juba Peace Process ended, the three remaining LRA leaders—Kony, Odhiambo, and Ongwen—resumed fighting with the LRA. In October 2013, one month after an international coalition of forces, including the United States, increased the military effort against the LRA, Odhiambo was reported to have died in battle.<sup>306</sup> Odhiambo was certified deceased by the Ugandan government, and in 2015, the ICC subsequently ended proceedings against him.<sup>307</sup>

One indicted LRA leader, Dominic Ongwen, has been apprehended, arrested, and brought to trial at the ICC. On January 6, 2015, Ongwen surrendered to Seleka rebels, with whom the LRA had been fighting, who turned him over to US forces.<sup>308</sup> From there, he was transferred to ICC custody, and ICC proceedings against him began later that month.<sup>309</sup> It is important to note that Ongwen's trial has raised important dilemmas about international justice, largely because Ongwen joined the LRA because he was abducted

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<sup>304</sup> International Criminal Court. "Decision to terminate the proceedings against Raska Lukwiya." July 11, 2007. Accessed July 18, 2019. <https://www.icc-cpi.int/pages/record.aspx?uri=297945>

<sup>305</sup> Smock, "Uganda/Lord's Resistance Army Peace Negotiations: An Update from Juba." p. 2

<sup>306</sup> International Criminal Court. "ICC terminates proceedings against Okot Odhiambo following forensic confirmation of his passing." September 10, 2015. Accessed on July 18, 2019. <https://www.icc-cpi.int/pages/item.aspx?name=PR1147>

<sup>307</sup> *ibid.*

<sup>308</sup> International Criminal Court. "Ongwen Case." Accessed on July 18, 2019. <https://www.icc-cpi.int/uganda/ongwen>

<sup>309</sup> *ibid.*



when he was around ten years old and forced to become a LRA soldier.<sup>310</sup> Although he is only charged with crimes that occurred after he turned 18, observers grapple with the implications of his history as a child soldier.<sup>311</sup> As of this writing, Ongwen is still standing trial at the Hague.<sup>312</sup>

## 8.0 Conclusion

The failure of the Juba Peace Process illustrates how the ICC can act as a spoiler for civil war peace negotiations when it assumes a prosecutorial rather than oversight role. It also highlights the conditions under which the ICC assumes a prosecutorial role, which go far beyond whether the Court has issued charges and released arrest warrants. Indeed, this chapter shows that whether the Court assumes a prosecutorial role depends as much, or more, on the public signals of the Prosecutor, as well as how they align with or contradict the public signals of human rights advocates and mediators in the peace process. The case of Uganda also shows that when other actors undermine the Rome Statute's anti-impunity norms—such as when human rights or pro-peace organizations issue statements calling for amnesty for leaders—the ICC can be compelled to publicly reiterate its commitment to assuring accountability, and thus assume a more prosecutorial role in the conflict situations.

When the Court assumes this prosecutorial role, and repeatedly, consistently, and publicly affirms that leaders should be prosecuted for human rights violations, the latent threat that the Court presents to leaders' post-conflict fates transforms to an active threat to leaders' exit options. If leaders calculate that they cannot neutralize this threat through

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<sup>310</sup> Baines, Erin K. "Complex political perpetrators: reflections on Dominic Ongwen." *The Journal of Modern African Studies* 47, no. 2 (2009): 163-191

<sup>311</sup> Branch, A. (2016). Dominic Ongwen on Trial: The ICC's African Dilemmas. *International Journal of Transitional Justice*, 11(1), 30-49.

<sup>312</sup> International Criminal Court. "Ongwen Case."

peace negotiations, it makes them more likely to resume the fight in a gamble that victory in the war, or simply continuing the war, will protect them from post-conflict punishment. The case of Uganda illustrated this—when LRA leaders decided that they could no longer use the Juba Peace Process to neutralize the threat of ICC prosecution, they abandoned the peace negotiations and resumed the fight.

Still, my dissertation's central contention is that it does not have to be this way. Even when it is committed to prosecuting culpable leaders, the Court does not have to serve as a spoiler of peace negotiations because it does not have to assume a prosecutorial role. The next chapter examines the case of Colombia, and outlines the conditions under which the Court can play an oversight role in peace negotiations and even act as a guarantor of the peace.

## **CHAPTER 5 | THE ICC AS GUARANTOR IN COLOMBIA**

### **1.0 Introduction**

This dissertation explores the various roles that the ICC can play in peace negotiations, depending on the conditions of the negotiation, the positions taken by the rebel group, and the ICC's position within the negotiations. In Chapter 2, I argued that under some conditions, the ICC can act as a guarantor in peace negotiations. This chapter uses the case of the Colombian peace process to show how the ICC can act as a guarantor, argue that the ICC did act as a guarantor of the peace between Colombia and the FARC, and outline some generalizable conditions under which the ICC can act as a guarantor.

Chapter 2 posited that the ICC can act as a guarantor when the ICC assumes the role of overseer of peace negotiations, rather than of prosecutor. Whether the ICC acts as an overseer is largely down to the ICC's own decisions, and to how other actors involved in the peace process or in promoting human rights talk about Rome Statute norms. Regarding the ICC's own decisions, two factors are especially crucial. First, if the Court has not yet reached a formal prosecutorial phase of involvement, and is still in a preliminary examination or investigation of a conflict, it can more easily assume the role of an overseer, because no criminal charges have yet been issued. Thus, it has the latent potential to prosecute, but is not yet in a formal prosecutorial role. Second, the approach of the Prosecutor, and the way the Court publically signals about its work in the conflict situation is crucial to whether the Court plays an oversight or prosecutorial role. If the Prosecutor emphasizes that the normative commitments of the Rome Statute are about

justice broadly, and do not necessitate international prosecution in every situation, the Court remains in an oversight role, and remains a latent, not active, threat of prosecution.

It is important to note here that one of the ICC's roles in all conflict situations in which it conducts a preliminary examination is to remind the parties of the conflict of their Rome Statute obligations. In the context of peace negotiations, this usually means reminding the parties that, under the Rome Statute, perpetrators of grave atrocity crimes cannot be granted amnesty and must face judicial accountability. When the ICC chooses a public relations approach that emphasizes justice over prosecution, it is restrained about how, when, and to whom it delivers those reminders. It often chooses to deliver those reminders privately, eschewing press releases or public statements. When it does choose to deliver public statements, these statements are often restrained and simply re-iterate the terms of the Court's involvement in and expectations for the situation, rather than exhorting or condemning particular actions. Finally, ICC promotion of justice broadly rather than prosecution narrowly often relies more on the ICC's presence rather than overt political declarations. For example, the ICC might simply announce that it is visiting the country, or attending a diplomatic event, rather than commenting directly on negotiations.

How the Court communicates its commitment to justice in a conflict situation only partially concerns the approach of the Court's Prosecutor. An extremely important factor is other actors' willingness to reinforce anti-impunity norms. When organizations advocating for human rights and peace repeatedly and publicly insist on the need for accountability, they allow the Court to act as an overseer for two reasons. First, they remove the Court's incentive to make public statements against impunity, freeing up

space for it to act more as an investigator and an overseer. Secondly, they remind belligerents of the latent threat of ICC prosecution without heightening the threat. Since no other international institution advocating for human rights has the ability to issue indictments for offenders around the globe, no other human rights advocates' statements against impunity carry the same threat to leaders' exit options. In other words, when the ICC states that it will not accept impunity for crimes, its ability to actually mount prosecutions means that this statement can amount to an escalated threat to leaders' exit options. However, when another human rights organization states that impunity is unacceptable, and the ICC is already involved in the situation, but stays silent, the statement only serves to remind leaders of a latent, and still negotiable, threat.

In this chapter, I argue that all of these conditions were met in Colombia: that the Court assumed the role of overseer because of it never elevated the status of the case past a preliminary examination, because the Prosecutor took a careful approach that emphasized justice over international prosecution, and because human rights and peace advocates facilitated that quiet approach by amplifying the Court's normative commitment to end impunity. As a result, the ICC served as a guarantor of the Colombian peace agreement of 2016, both during its negotiation and during its implementation. Further, I argue that we can identify conditions of the Colombian case that are generalizable to other peace negotiations, and that indicate when we can expect the ICC to serve as a guarantor, rather than a spoiler, of peace.

Still, there were several key, context-specific aspects of the Colombian case that enhanced the FARC's agency and enabled the ICC to use lenient signaling: the role of the InterAmerican Court of Human Rights (IACtHR), and the highly publicized commission

of war crimes by Colombian state actors. These aspects bear much more elaboration. Thus, this chapter proceeds as follows. The next section provides a brief justification of this chapter's case selection, as well as a description of the data and methods used. The third section details the historical context of the case, and also provides descriptions of key conditions of the case, including how the role of the IACtHR and Colombian state crimes conditioned debates on post-conflict accountability in Colombia, why the FARC had considerable agency in peace negotiations, and how the ICC used lenient, subtle signals to remind the government of Colombia (GoC) and the FARC of their Rome Statute obligations. The fourth section presents a narrative of the ICC's involvement in the Colombian peace process, culminating in the signing of the peace agreement in September 2016. The fifth section describes how the ICC continued to act as a guarantor of the peace agreement after it was signed, and how all sides in the conflict directly appealed to the ICC to act as a guarantor of post-conflict justice. The sixth section concludes.

## **2.0 The case selection, data, and methods**

The central reason I use this chapter to analyze the Colombian peace process is because it exemplifies how the ICC can play an oversight role in peace negotiations. As Sections 3.2 to 3.5 of this chapter will detail, the four conditions that help the ICC to play an oversight role in a conflict situation are present in this case: the ICC's formal role in the case never advanced past the preliminary examination phase, the ICC took a public relations approach that emphasized the pursuit of justice over its mandate to conduct international prosecutions, the public support of a constellation of human rights and peace advocates who were extremely savvy to the role of international criminal tribunals,

and the involvement of a regional court that helped actors learn to incorporate an international tribunal into their political calculations.

To show how the Colombian peace process demonstrates the ICC playing an oversight role and therefore acting as a guarantor, I use a qualitative case study based entirely on publicly available data sources. I draw from accounts of the peace negotiations published by the FARC and the GoC, which are available on an online archive. I also draw from the published accounts of observers who were in Colombia during the period, and of analysts of Colombia, including Ana Arjona, June S. Beittel, Jemima Garcia-Godos, Robin Kirk, Knut Andreas Lid, and Claire Metelis. I also relied on reports from various think tanks, including the Wilson Center, the US Institute for Peace, and the Rand Corporation.

For further corroboration, I also consulted the reports of international institutions, especially the IACtHR and ICC, and NGOs, including Amnesty International (AI), Human Rights Watch (HRW), and International Crisis Group (ICG). Finally, to corroborate the timeline of events, I relied heavily on Colombian newspapers, principally *El Tiempo*, *La Semana*, and *El Colombiano*, as well as international news services such as IRIN, Reuters, the New York Times, The Guardian (UK), The Independent (UK) and the BBC.

In this chapter, I analyze this data in two ways. In the following section (3.0), I present a detailed analysis of how the four scope conditions that my theory specifies in order for the ICC to assume an oversight role were present in the Colombian case: a formal investigatory role for the ICC, the ICC's emphasis of justice over prosecution in its approach to the conflict, an empowered constellation of human rights and peace

advocates who publicly insist on the normative commitments of the Rome Statute, and a regional court that conditioned these advocates to be able to work effectively with an international tribunal. I also present a detailed analysis of other conditions that affected the success of peace negotiations, including the Colombian government's established culpability for human rights violations and the FARC's relative power. Then, I present a chronological narrative of the Colombian peace process beginning in 2002 and culminating through the ratification of the peace agreement in 2016 and the ICC's continued role in monitoring the implementation of the peace agreement. In this narrative, I trace out how the ICC played the role of overseer, and how that oversight role promoted the success of peace negotiations.

### **3.0 The context**

The Colombian civil war was a decades-long conflict with centuries-old roots. Colombia's location is indicated below, in Figure 5.3. Since its days as a Spanish colony, Colombia has long struggled to equitably distribute land. In colonial days, land was apportioned to benefit colonial elites, and upon independence, the government's land reforms maintained a status quo that favored the wealthy, and further marginalized many peasants, who lost their land and earned a living working the land of wealthy landowners. As a result, when agriculture boomed in Colombia, the peasants who worked the land saw few of the benefits of the boom, as they did not own the land.



Figure 5.3. Map indicating the location of Colombia<sup>313</sup>



Tensions over the distribution and regulation of land persisted through the early twentieth century, and heightened throughout the 1920s, 1930s and 1940s. Land was a key wedge issue between the Liberal and Conservative political wings and undergirded an increasingly hostile political arena. In the 1940s, the Liberals introduced a sweeping reform agenda aimed at rectifying the social imbalances brought on by Colombia's land distribution, and Conservative opposition to this agenda stoked tensions. Political animosity boiled over in April 1948, with the assassination of the Liberal leader.

April 1948 started a period still known as *La Violencia*. Protests that originated in Bogota moved to rural regions, and soon spurred thousands of political activists to take up arms. The country was, for a short period, convulsed by violent unrest, which was then quelled by violent state repression. The state killed the key figures in the uprising, and in response to these violent tactics, resistance groups formed.

<sup>313</sup> This image is accessible at <https://www.freeworldmaps.net/southamerica/colombia/location.html>.

Since the uprisings lasted the longest in the rural regions of the country, state repression was harshest in the countryside. As a result, peasants formed self-defense organizations to protect themselves from government enforcers. At the same time, some peasants were spurred on to fight for liberal or communist ideals, and were galvanized by ideology, rather than self-preservation, to join armed groups. Further, due to ongoing government violence, the territories held by peasant self-defense groups became the safest places for many rural civilians, thus furthering the peasant resistance groups' reach and increasing their civilian support.

These insurgent peasant groups continued to grow, and by the early 1950s they controlled enough territory to threaten the cohesion of the Colombian state. Realizing their strength, these peasant insurgencies began a project of national consolidation, in hopes of using their combined power to institute political reforms. At the same time, in the cities, the Liberals and Conservatives came to a power-sharing agreement, known as the National Front, that disproportionately empowered the executive branch and the military. This political arrangement paved the way for more military crackdowns on rural insurgents, and conflict continued.

The state's renewed military offensive spurred the peasant insurgent groups to keep meeting. In 1966, at the second annual national conference of these groups, the FARC was formed. The FARC combined several kinds of peasant insurgent groups: those who still fought mainly for self-defense, those who fought for agrarian reforms, and those who were fully-fledged communists. Although, at that time in Colombia, communists also had roots in the cities, the FARC's base was distinctly rural, and had little reach in Colombia's cities.

In its first years, the FARC existed largely as a peasant defense group. Due to this focus, it carried out many social welfare functions, as well as its armed operations. As the FARC was able to see successes in both goals and observed how peasants organized themselves for their collective welfare and protection, they expanded their agenda and articulated a sweeping set of political goals. Following a Marxist ideology, the FARC fought against social inequality and inequity in agrarian policies and political participation in Colombia. Throughout these early years, the FARC carried out many state-like functions in the areas it occupied: it provided social services, taxed civilians, and was careful to limit violence against civilians.

During the 1970s, the FARC restructured to form many fronts throughout its territory, as its territorial holdings had expanded considerably. Correspondingly, the Colombian government intensified its efforts against the FARC, and right-wing paramilitary groups arose to fight the FARC in the rural areas it controls. In the early 1980s, the FARC used increasingly offensive tactics to fight the war.

In the mid 1980s, the FARC signed a ceasefire with the Colombian government and began a round of peace talks with President Betancour's administration. During this period, the FARC and other leftist groups formed the Union Patriótica (UP), a political party. The UP had four representatives elected to the Colombian Congress and forwarded two presidential candidates.

During this period, the FARC pioneered its strategic kidnapping of wealthy civilians. Armed peasant groups had used kidnapping as a tactic during La Violencia; the FARC re-discovered this tactic to make political statements and to raise funds by

demanding ransoms. As the conflict progressed, the FARC continued to use kidnapping, but its primary revenue stream began to come from its control of the illicit drug trade.

In 1998, the GoC attempted to hold peace talks with the FARC, but they ended when the FARC kidnapped key political figures. Then, in 2000, the Colombian government and the American government launched Plan Colombia, a militarized attempt to stem the flow of drugs out of Colombia, and to fight the drug trafficking within Colombia that benefitted the FARC. In 2004, the Colombian government launched Plan Patriota, designed to uproot guerrilla groups in Colombia, gain military control over rural areas controlled by rebel groups and introduce social programs into those areas.

To counter these offensives, the FARC launched Plan Resistencia in 2006. It was timed to coincide with the re-election of President Uribe, and to use violent attacks create the impression that Uribe had not succeeded in increasing security in Colombia. Nonetheless, Uribe won re-election, and in 2006, the FARC and Uribe entered preliminary peace talks. 2007 and 2008 saw two major scandals about GoC crimes—in 2007, the parapolitica scandal exposed the deep and pervasive links between Colombia's paramilitaries and central government figures, and in 2008, the false positives scandal showed how the paramilitaries colluded with government officials to kill thousands of innocent civilians.

In 2008, the FARC lost three of its top commanders, and returned to a traditional guerilla military strategy. In late 2010, after the inauguration of President Santos, and the death of a fourth top FARC commander, secret informal peace negotiations between the GoC and the FARC began. These talks continued despite the FARC's increased military

offensives in 2011, and the death of another top FARC leader. In August 2012, Santos and the FARC announced that they would begin formal peace talks.

### 3.1 State war crimes

Throughout the civil war, the GoC had several highly public scandals concerning war crimes committed by its soldiers, or by members of state-affiliated paramilitary groups. Most notably, the false positives scandal showed that killing civilians was a widespread, coordinated, and strategic practice of Colombian paramilitary groups. The Attorney General of Colombia found that 4,475 civilians were killed in attempts to bolster body counts of guerrilla soldiers, and that 5,137 state officials were connected to the scandal. 931 people were convicted for their involvement in this scandal, with 862 of them being members of the National Army.<sup>314</sup> Further, the parapolitica scandal, in which scores of Colombian politicians were linked to paramilitary groups accused of war crimes, showed the extent to which the paramilitary groups carried out the agendas of factions within the Colombian government.<sup>315</sup>

Indeed, imprisoned Colombian soldiers are an important constituency of the peace process, and their experiences are well-known.<sup>316</sup> This matters for rebel leaders' calculations during peace negotiations, as the very existence of soldiers imprisoned for war crimes demonstrates that, in Colombia, criminal accountability for war crimes is not simply a tool that the government uses to prosecute the rebels, or a cudgel of government power against dissidents. Perhaps more importantly, the GoC itself came under ICC

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<sup>314</sup> colombiareports, "Colombia's False Positives | Fact Sheet," *Colombia News | Colombia Reports* (blog), March 14, 2017, <https://colombiareports.com/false-positives/>.

<sup>315</sup> Holmes, Jennifer S., and Sheila Amin Gutiérrez de Piñeres. "Violence and the state: Lessons from Colombia." *Small Wars & Insurgencies* 25, no. 2 (2014): 372-403.

<sup>316</sup> Cox, Aubrey and Maria Antonia Montes. "Colombia—War Crime Prisoners Face Past, Plan Future." *United States Institute of Peace*. December 26, 2017. <https://www.usip.org/publications/2017/12/colombia-war-crime-prisoners-face-past-plan-future> Accessed March 25, 2019.

scrutiny for the false positives scandal, demonstrating that the ICC was not a tool that the state could manipulate to use against the rebels, and could also be used to hold the state to account for its crimes.<sup>317</sup>

### **3.1.1 The paramilitaries**

It is crucial to note that paramilitary troops committed many of the war crimes for which the GoC was held responsible. Paramilitaries occupied a grey and shifting area between state and non-state actor,<sup>318</sup> and this was crucial to the FARC's understanding of post-conflict justice for several reasons. First, as the paramilitaries were an irregular military force, the FARC could observe how domestic and international justice was discussed and meted out to a fellow non-state armed group. Secondly, although the paramilitaries were not a state military, to the FARC—and to many other observers of the conflict—the paramilitaries were functionally a state party, and so when the paramilitaries were held accountable for their conduct, it demonstrated that state parties could be held accountable, and that justice was not only a tool of state power. Both of these reasons bear further discussion.

Although the paramilitaries were widely understood to be agents of members of the Colombian government, the Colombian government was unable to extend to them all of the protections and privileges that would have been extended to military actors, and in public maintained a distinction between the paramilitaries and the military. As a result, discussions about transitional justice and disarmament options for the paramilitaries bore many parallels to discussions about the post-conflict fates of non-state fighters. In

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<sup>317</sup> ICC, "Situation in Colombia - Interim Report," p. 93.

<sup>318</sup> "Paramilitaries' Heirs: The New Face of Violence in Colombia. *Human Rights Watch*. February 3, 2010. <https://www.hrw.org/report/2010/02/03/paramilitaries-heirs/new-face-violence-colombia> Accessed March 25, 2019.

observing discussions about disarmament and reintegration of paramilitaries, the FARC gained an important opportunity to assess the options available to them after the conflict, and to assess the political possibilities of those respective options. Further, in observing the processes of negotiating and implementing these disarmament and reintegration measures, the FARC gained an important opportunity to learn from the paramilitaries' mistakes. They could add these lessons to their strategic playbook, and therefore could enter peace negotiations with more information.

Perhaps more importantly, since the FARC viewed the paramilitaries as state supported, seeing them held accountable through international justice mechanisms disabused the FARC of any notion that international justice is a tool that states can unilaterally wield against less powerful actors. Several cases at the IACtHR held Colombia to account for failing to address human rights abuses committed by paramilitaries. One of the most important was the 19 Merchants case, in which nineteen tradesmen were found executed by a paramilitary group, an event “masterminded by and with the support of Colombian Army officers.”<sup>319</sup> Throughout the course of the case, the IACtHR clearly established the connections between the paramilitary perpetrators and Colombian military officers who coordinated the attack on the merchants, and ruled that, in its failure to hold the perpetrators accountable, the GoC had abrogated its responsibility to give its citizens a fair trial.<sup>320</sup> The IACtHR ordered the GoC to properly investigate the incident and to hold the perpetrators accountable, hold a public ceremony commemorating the victims, and pay reparations to the families of the victims. This

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<sup>319</sup> “Case of the 19 Merchants v. Colombia: Judgment of July 5, 2004.” *InterAmerican Court of Human Rights*. July 5, 2004. [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_109\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_109_ing.pdf) Accessed on March 25, 2019.

<sup>320</sup> *Ibid.* p. 131

ruling demonstrated that if the GoC attempted to use its own justice system to shield the paramilitaries from accountability, an international court could force the GoC's hand in holding them accountable. In this case, the IACtHR acted as an external guarantor to ensure that the GoC could not manipulate justice for its own strategic interests and demonstrated that an international court could function as a guarantor of justice.

Also important was the timing of the 19 Merchants ruling. The final judgment in the case was delivered in July 2004,<sup>321</sup> while the ICC opened its preliminary examination into the Colombian situation less than a month before.<sup>322</sup> It is extremely significant that at almost the precise political moment that the ICC opened its preliminary examination in Colombia, both the FARC and the GoC saw another supranational court demanding that fighters acting on the behest of the state be held accountable for human rights violations. This definitively demonstrated that an institution like the ICC was just as well situated to hold state actors to account as it was to hold non-state actors to account.

### **3.2 The InterAmerican Court of Human Rights**

The IACtHR was a crucial player on questions of post-conflict justice not only due to its role in cases such as the 19 Merchants, but by virtue of its institutional design. It was created and structured to hold states accountable for their international human rights obligations, and so all of the cases that it tries either hold the state accountable for its own wrongdoing or for its failure to adequately address another actor's wrongdoing. The IACtHR can only bring cases against states, and thus holds the state responsible for human rights abuses it sanctioned or failed to prevent. Further, the IACtHR's rulings as

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<sup>321</sup> Ibid.

<sup>322</sup> "Colombia." Coalition for the International Criminal Court.  
<http://www.coalitionfortheicc.org/country/colombia> Accessed March 25, 2019.



legally binding for state parties, which include Colombia.<sup>323</sup> As a result, the FARC had years to observe the GoC being brought to account in front of an international court for failure to live up to its human rights obligations, and could be under no illusion that such institutions necessarily protected the state. By the time of the 2016 peace process, the IACtHR had brought sixteen cases against the GoC, and more than half of them were for human rights abuses committed by paramilitary troops.<sup>324</sup>

Further, the FARC had the opportunity to witness an international court exerting pressure on the state to live up to human rights obligations, and to see how this pressure actually led to changes in the GoC's policy.<sup>325</sup> In response to IACtHR rulings, the GoC has paid reparations to families of victims, located the remains of victims of paramilitary massacres, issued public apologies, and changed domestic laws to better uphold its international human rights treaty obligations.<sup>326</sup>

Finally, the fact that the IACtHR's expectations on compliance with human rights norms mirrored the ICC's expectations on compliance with human rights norms bolstered the ICC's influence in the Colombian peace process. Crucially, the IACtHR also does not allow amnesties,<sup>327</sup> meaning that the ICC would not be the only international judicial body acting as a veto player on the amnesty question in the peace process. Perhaps even more importantly, due to its more limited mandate of only prosecuting the state, the IACtHR was perfectly situated to advocate for international criminal accountability

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<sup>323</sup> *Organization of American States*. "American Convention on Human Rights" November 22, 1969. <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp> Accessed March 25, 2019.

<sup>324</sup> "Casos Contenciosos" *Corte Interamericana de Derechos Humanos*. [http://www.corteidh.or.cr/CF/Jurisprudencia2/busqueda\\_casos\\_contenciosos.cfm?lang=es](http://www.corteidh.or.cr/CF/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=es) Accessed March 25, 2019.

<sup>325</sup> Hillebrecht, "The domestic mechanisms of compliance with international human rights law: Case studies from the Inter-American human rights system."

<sup>326</sup> For more on this, see *ibid*, p. 978-983.

<sup>327</sup> Binder, Christina. "The prohibition of amnesties by the Inter-American Court of Human Rights." In *International Judicial Lawmaking*, pp. 295-328. Springer, Berlin, Heidelberg, 2012.

norms, and to move against amnesty, without acting as a direct threat to the FARC, since the IACtHR did not have the mandate to hold the FARC directly accountable for war crimes. Indeed, throughout its history, the IACtHR publicly and repeatedly condemned the GoC's human rights abuses<sup>328</sup>, playing a role of vocal anti-impunity advocate that the ICC did not have to play.

### 3.3 NGO advocacy

The ICC's position was also bolstered by NGO advocacy, both from local grassroots organizations, and powerful international NGOs. Several major NGOs were vocal, consistent, and insistent advocates of criminal accountability for GoC and FARC leaders, and they often made the ICC's case against impunity without the ICC ever having to say a word in public. For instance, the International Crisis Group (ICG) issued 32 public reports on the Colombian peace process, and had over 500 meetings with stakeholders.<sup>329</sup> The imperative of avoiding impunity and holding high-level perpetrators criminally accountable was a consistent refrain throughout these reports. Likewise, HRW holds international justice as a major issue area in their priorities for Colombia, and has been a consistent advocate of criminal accountability for high-level perpetrators of war crimes.<sup>330</sup> AI has also consistently advocated against impunity in Colombia,<sup>331</sup> and issued numerous reports on its consequences for Colombian civilians.<sup>332</sup>

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<sup>328</sup> Mimi Yagoub, "Intl Court Condemns Colombia for Bloody 2002 Military Operation," *InSight Crime* (blog), January 11, 2017, <https://www.insightcrime.org/news/brief/intl-court-condemns-colombia-bloody-2002-military-operation/>.

<sup>329</sup> "Colombia" International Crisis Group. <https://www.crisisgroup.org/latin-america-caribbean/andes/colombia> Accessed March 25, 2019.

<sup>330</sup> "Colombia" Human Rights Watch. <https://www.hrw.org/americas/colombia> Accessed March 25, 2019.

<sup>331</sup> "Colombia: Peace agreement must open the door to justice." *Amnesty International* December 1, 2016. <https://www.amnestyusa.org/press-releases/colombia-peace-agreement-must-open-the-door-to-justice/> Accessed March 25, 2019.

<sup>332</sup> "Colombia: Hidden From Justice." *Amnesty International*. October 2012. [https://www.amnestyusa.org/files/colombia\\_vaw\\_report\\_oct\\_4\\_embargoed.pdf](https://www.amnestyusa.org/files/colombia_vaw_report_oct_4_embargoed.pdf) Accessed March 25, 2019.

### 3.4 The FARC's agency

The FARC had considerable agency in peace negotiations. It was empowered to exercise leverage over the GoC and navigate the complex legal, political and diplomatic issues of the peace process for several reasons. These reasons can be roughly categorized as the FARC's hard power—its military power, the territory in controlled, and the influence it exerted through the drug trade—and the FARC's soft power—the FARC's legal and political habituation, and the pressure the Colombian government faced to make peace.

The FARC enjoyed considerable power for three reasons: its military capability, its territorial control, and its role in the drug trade. The FARC was a militarily weak organization in terms of troop size, with only about 5,000 to 11,000 troops during the 2012-2016 peace negotiations. However, the FARC exerted considerable territorial control in Colombia, largely due to its rural, remote geographic base. Most importantly, the FARC's involvement in the illicit drug trade deepened its hard power because it constituted an important revenue stream, and was another important way for the FARC to control territory. The FARC is estimated to have earned between \$200 million and \$3.5 billion each year from cocaine revenue.<sup>333</sup> Further, the FARC's system of taxing the drug trade enhanced its territorial control, as it underscores the fact that the FARC undertakes many government functions in the areas it controls. The FARC taxes the cultivation, sale, production, and shipping of drugs that takes place on its territory,<sup>334</sup> just as the state would tax local businesses. Further, an estimated 300,000 Colombians' livelihoods

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<sup>333</sup> Otis, John. "The FARC and Colombia's Illegal Drug Trade." *Wilson Center*. November 2014. [https://www.wilsoncenter.org/sites/default/files/Otis\\_FARCDrugTrade2014.pdf](https://www.wilsoncenter.org/sites/default/files/Otis_FARCDrugTrade2014.pdf) Accessed March 25, 2019.

<sup>334</sup> McDermott, Jeremy. "The FARC and the Drug Trade: Siamese Twins?" *Insight Crime*. May 26, 2014. <https://www.insightcrime.org/investigations/farc-and-drug-trade-siamese-twins/> Accessed March 25, 2019.

depend on the drug economy, meaning that the FARC's role in the drug trade means that they have deep influence over 300,000 Colombians' economic well-being.<sup>335</sup>

The FARC also possessed considerable legal and political savvy, which it gained over years of attempting negotiations with the GoC and navigating a highly legalized conflict environment. The FARC became legally strategic because the law has long been a force to be reckoned with in Colombia's civil war. Due to the deep legalization of Colombia's public sphere, the FARC evolved to become very informed about the role of the law and courts, and adept at navigating around judicial actors.

Throughout the most intense decade of the conflict, the FARC's main military opponent was a constellation of pro-government paramilitary groups. In a sense, this adversary was created by Colombian law—in 1968, the Colombian Congress adopted a decree legalizing the formation of private self-defense groups,<sup>336</sup> which quickly evolved to become the paramilitary groups that would be major forces in the subsequent five decades of the conflict. Just as a law created one of the FARC's main adversaries, a law changed how these adversaries fit into the landscape of the conflict. After they realized the extent to which the paramilitaries were responsible for the civilian toll of the conflict, in 1989, the government passed laws eliminating the paramilitaries' legal status, and formalizing measures to disarm and weaken them.<sup>337</sup> These measures worked, the paramilitaries were greatly weakened, and as a result the rebel groups regained

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<sup>335</sup> Vargas, Ricardo. "The Revolutionary Armed Forces of Colombia (FARC) and the Illicit Drug Trade." *Transnational Institute*. June 9, 1999. <https://www.tni.org/en/publication/the-revolutionary-armed-forces-of-colombia-farc-and-the-illicit-drug-trade> Accessed March 25, 2019

<sup>336</sup> "Colombia's Killer Networks." *Human Rights Watch*. November 1996. <https://www.hrw.org/legacy/reports/1996/killer2.htm> Accessed March 25, 2019; Garcia-Godos, Jemima, and Knut Andreas O. Lid. "Transitional justice and victims' rights before the end of a conflict: the unusual case of Colombia." *Journal of Latin American Studies* 42, no. 3 (2010): 487-516, p. 492

<sup>337</sup> Méndez, Juan E. *The "Drug War" in Colombia: The Neglected Tragedy of Political Violence*. Human Rights Watch, 1990.

strength.<sup>338</sup> To combat a re-invigorated FARC, the government again used the law to create a new adversary for them: in 1994, Decree 356 legalized the creation of “cooperatives for vigilance and private security” (CONVIVIR).<sup>339</sup> These cooperatives were functionally paramilitaries, with the only functional difference between most CONVIVIR groups and the paramilitaries being their legal status.<sup>340</sup>

The GoC not only used the law to determine who the FARC would fight against, but the tools it could use in its political struggle. In an attempt at peace in 1982, the FARC learned that the legal status that the government afforded them could open or close options for political contestation beyond the battlefield. As part of this peace attempt, the GoC passed a broad amnesty law that offered costly concessions to the FARC: “unconditional amnesty for all acts of rebellion and all crimes connected with the rebellion, ...[excluding] only the murder of defenseless persons, atrocities such as indiscriminate murder or disfigurement, and gratuitous acts of violence such as rape.”<sup>341</sup> The FARC received this amnesty without having to disarm, and the FARC and the GoC entered a three-year ceasefire. During this period, due in part to the ceasefire but also largely due to the amnesty extended to them, the FARC created a political party, the Union Patriótica (UP). In its short lifespan, the UP won eight seats in Congress, six seats in the Senate, hundreds of city council seats, and a few mayorships.<sup>342</sup> The creation of the

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<sup>338</sup> Garcia-Godos and Lid "Transitional justice and victims' rights before the end of a conflict: the unusual case of Colombia.", p. 492; Metelis, Claire. *Inside insurgency: violence, civilians, and revolutionary group behavior*. NYU Press, 2009, p. 103.

<sup>339</sup> Bergquist, Charles, Ricardo Peñaranda, and Gonzalo Sánchez, eds. *Violence in Colombia, 1990-2000: waging war and negotiating peace*. Rowman & Littlefield Publishers, 2001, p. 22

<sup>340</sup> Garcia-Godos and Lid "Transitional justice and victims' rights before the end of a conflict: the unusual case of Colombia.", p. 492

<sup>341</sup> Jenkins, Brian Michael. "Colombia's Bold Gable for Peace. *Rand Corporation*. February 1985. <https://www.rand.org/content/dam/rand/pubs/papers/2008/P7055.pdf>, Accessed March 25, 2019, p. 5.

<sup>342</sup> Beittel, June S. "Peace talks in Colombia." Library of Congress, Congressional Research Service, 2014, p. 13.

UP was part of a strategic plan, hatched by the highest members of the FARC's command structure, for the traditionally rural FARC to better embed itself in cities.<sup>343</sup> However, when scores of UP members were assassinated, the FARC dismantled the party to concentrate on its military efforts.<sup>344</sup> Even so, the UP would not have existed in the first place without a legal concession granted by the Colombian government.

The FARC's habituation to Colombia's legal system can perhaps most clearly be seen in its attempts to control the local justice systems of the territory it occupied. Robin Kirk, a HRW researcher, affirmed that the FARC would not permit independent judges or prosecutors in the territory it controlled.<sup>345</sup> In contexts where they had the capacity, and a compliant civilian population, the FARC set up their own justice systems to supplant the state's.<sup>346</sup> A liberal councilmember of the city of Viota told Ana Arjona, a researcher, that the FARC "became a valid interlocutor" of legal disputes, and a communist leader of the same city told her of how policemen would turn to the FARC when they could no longer handle their cases.<sup>347</sup> Another politician told Arjona that the FARC "became like a center to mete out justice; like a court, and [the commander] was the judge."<sup>348</sup>

All of this suggests that, even prior to the involvement of the ICC, the FARC was perhaps especially habituated among rebel groups to understand and respond to legal changes in the context of a conflict. Through these examples, it is clear that the FARC could use the law and the institutions enshrining it as tools to promote their own interests,

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<sup>343</sup> Metelis, *Inside Insurgency*, p. 98.

<sup>344</sup> Beittel, "Peace talks in Colombia," p. 13; Metelis, *Inside Insurgency*, p. 99.

<sup>345</sup> Kirk, Robin. 2001. Interview with Pablo Policzer. 3 July 2005.

<sup>346</sup> Arjona, Ana. *Rebelocracy*. Cambridge University Press, 2016, p. 240.

<sup>347</sup> Ibid.

<sup>348</sup> Ibid.

or that they understood them as obstacles to be strategized around. In any case, the FARC had ample understanding of the fact that, even in wartime, the rule of law can matter.

Further, the Colombian government faced considerable domestic and international pressure to end the conflict. President Santos campaigned strongly on a promise for peace, and when he was elected in 2010, observers commented that his campaign promises amounted to a mandate to succeed in the peace process.<sup>349</sup> The GoC also faced economic pressure to reach peace, as declining oil prices after 2010 confronted it with new, compelling incentives to develop its rural economy in FARC-controlled areas to offset the economic losses.<sup>350</sup> The fact that the GoC faced these pressures to make peace enhanced the FARC's political positions going into the formal peace negotiations that led to the 2016 agreement.

### **3.5 The ICC's role as justice promoter**

The ICC avoided directly criticizing the parties in the peace process, and instead expressed any concerns through requests for information or clarification. When there was concern that Colombia's legal principles or policies did not align with the Rome Statute, the ICC submitted a public request for clarification of the policies, and in a few cases, directly expressed concerns that they did not align with the Rome Statute. In two cases, the ICC directly articulated the legal concept as outlined in the Rome Statute, still without directly condemning how Colombia's conceptualization did not align with the Rome Statute definition.

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<sup>349</sup> "Shaping the Peace Process in Colombia." *International Crisis Group*. July 7, 2017. <https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/shaping-peace-process-colombia-0> Accessed at March 25, 2019.

<sup>350</sup> Villar, Leonardo. "How Colombia's Economic Outlook Puts Pressure on Peace Deal." *Americas Quarterly*. <http://www.americasquarterly.org/content/paying-peace> Accessed on March 25, 2019.

It is worth noting that, in a review of all Colombian newspaper articles on the ICC's role in the peace process, Prosecutor Bensouda only seemed to make one direct, oral statement to the press, and that this statement was supportive of the work of Colombia's courts in implementing the peace agreement.<sup>351</sup> All other ICC statements on the Colombian conflict were written, either as public statements, pieces in Colombian newspapers, open letters to Colombian government actors, or as reports on the preliminary investigation. This suggests that all of the ICC's public statements on Colombia—especially those that could be construed as critique—were carefully calibrated and controlled.

Further, the ICC used carefully timed visits and statements to evidence its consistent, but not overwhelming, involvement in the peace process. Sometimes, these statements and visits seem to be timed in response to controversies raised by others, either members of civil society or the state or rebels themselves. At other points, these visits emphasized the ICC's ongoing preliminary examination in Colombia.

#### **4.0 The case study**

On August 5, 2002, Colombia ratified the Rome Statute. Colombia had signed the document four years before, in 1998, as President Pastraña initiated a new round of negotiations with the FARC. At that point, the FARC enjoyed a state-sanctioned safe haven of territory in the eastern part of Colombia. It was roughly the size of Switzerland. Indeed, the late 1990's was an era of strength for the FARC. In July of 1999, a majority

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<sup>351</sup> "Fiscal de Corte Penal Internacional respaldo proceso de paz con Farc" *El tiempo*. September 12, 2017. <http://www.eltiempo.com/justicia/investigacion/fiscal-de-corte-penal-internacional-respaldo-proceso-de-paz-con-farc-130328> Accessed March 25, 2019



of Colombians expressed in a Gallup poll that they thought the FARC could one day depose the government by force.<sup>352</sup>

The period between Colombia's signing and ratification of the Rome Statute saw a series of fits and starts in peace negotiations with the FARC. In October 2001, the FARC and the GoC signed the San Francisco Agreement—the FARC agreed to negotiate a ceasefire, and the government agreed to extend the FARC's safe zone until January of 2002.<sup>353</sup> In January, the Colombian government extended the FARC's safe zone through April 2002; however, in February of 2002, after the FARC hijacked a plane to kidnap a high-ranking senator, President Pastraña revoked the safe zone and called off peace negotiations.<sup>354</sup> In a televised address, he said of the FARC, "No one believes in their willingness to reach peace."<sup>355</sup>

It was in this context of renewed hostilities that President Uribe was elected, in May 2002. A tougher strategy against the FARC was one of Uribe's central campaign promises. Throughout the campaign, Uribe had been a "staunch critic" of the safe zone granted to the FARC, and of the fact that the government negotiated peace with them despite the continuing hostilities they mounted.<sup>356</sup>

Colombia ratified the Rome Statute during President Pastraña's final days in office, after Colombia's Constitutional Court held an extraordinary session to be sure to

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<sup>352</sup> Beittel, "Peace talks in Colombia," p. 13.

<sup>353</sup> <http://www.noticias.nl/october-2001-san-francisco-de-la-sombra-peace-accord>

<sup>354</sup> Forero, Juan. "Colombian Rebels Hijack and Plane and Kidnap a Senator." *New York Times*. February 21, 2002. <http://www.nytimes.com/2002/02/21/world/colombian-rebels-hijack-a-plane-and-kidnap-a-senator.html> Accessed March 25, 2019.

<sup>355</sup> Ibid.

<sup>356</sup> "The Stakes in the Presidential Election in Colombia" *International Crisis Group*. May 22, 2002. <https://reliefweb.int/report/colombia/stakes-presidential-election-colombia> Access March 25, 2019.

approve its ratification before Uribe took office.<sup>357</sup> Upon its ratification, Colombia's UN Ambassador said, "The ratification of this instrument is a very important step for us and demonstrates our commitment to strengthening international law."<sup>358</sup>

While ratification signaled Colombia's commitment to international law as a concept, Colombia held a crucial reservation to the Rome Statute that showed its hesitance about the ICC's reach within its borders. Colombia's ratification stipulated a reservation on Article 124, which meant that the ICC's jurisdiction over war crimes committed in Colombia would be delayed for seven years. The Court itself accepted this reservation, and welcomed Colombia's ratification of the Rome Statute.

Human rights advocates, however, were more critical. In September 2002, HRW called on President Uribe to remove the reservation on Article 124, and ratify the Rome Statute in full. HRW critiqued the reservation itself, calling it a "prelude to impunity."<sup>359</sup> Perhaps more tellingly, it critiqued the opacity of the process by which the reservation was added, saying that the reservation was not made known to Colombia's public or Congress, and that "The government of President Andrés Pastraña made the declaration two days before President Uribe took office, reportedly in consultation with the new president."

Several aspects of these events should be noted. First, it is important that the ICC accepted such a significant deferral of its jurisdiction concerning war crimes in a country that was currently at war without public comment or protest. Second, it is important that

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<sup>357</sup> "Colombia Ratifies the Rome Statute of the International Criminal Court" *Coalition for the International Criminal Court*. August 2, 2002.

<http://www.iccnw.org/documents/08.05.2002Colombiaratifies.pdf> Accessed March 25, 2019.

<sup>358</sup> Ibid.

<sup>359</sup> "Colombia's ICC Declaration a 'Prelude to Impunity'" *Human Rights Watch*. September 5, 2002. <https://www.hrw.org/news/2002/09/05/colombias-icc-declaration-prelude-impunity> Accessed March 25, 2019

the GoC did in fact receive protest and pressure regarding its ascension to the Court, and its attempt to insulate its citizens from accountability for war crimes. It is equally important that this protest did not come from the Court, but from human rights advocates. This set an important precedent, which was to exemplify a pattern to come—while the ICC would be an important factor in discussions of justice in and after Colombia's conflict, and an actor with a clear point of view and set of priorities, the Court rarely aggressively advocated on its own behalf. Instead, when Colombia's interactions with the ICC raised doubts about its commitment to criminal accountability, a constellation of other powerful and vocal human rights actors advocated for accountability and against impunity, while the ICC itself stayed silent.

Third, it is significant that after consultation with Uribe, Pastrana's administration added a last-minute protection shielding the GoC and Colombians from prosecution. This sent an important signal that Uribe felt that his coalition had something to fear on that front, which served as an important reminder that the ICC was designed to hold both state and non-state actors to account. This tacit admission that Uribe had something to fear from the Court showed that, in Colombia, the ICC could not be used unilaterally as a tool of state power against rebel fighters, as other governments had tried to do. Further, it showed that the ICC had the potential to constrain and punish both state and non-state actors.

In spite of Colombia's Article 124 reservations, and the ICC's celebration of its ratification of the Rome Statute, the ICC quickly showed that it considered Colombia's situation to be serious and important. In June 2003, Prosecutor Moreno-Ocampo stated in a report and at the UN that he felt that Colombia was one of the three "gravest

occurrence[s] of crimes under its treaty jurisdiction.”<sup>360</sup> The other two countries that merited this dubious distinction were the Democratic Republic of the Congo, and Uganda—both African countries that, in later years, were used as evidence of the Court’s “Africa problem.”

Prosecutor Moreno-Ocampo’s pronouncement did not meet any public response from President Uribe. Instead, at the same time, Uribe launched Plan Patriota, an initially covert attempt to retake the Switzerland-sized zone that had been granted to the FARC under Pastrana, destroy the FARC’s drug production infrastructure, and demobilize the many paramilitary groups that fought the FARC and increased the civilian toll.<sup>361</sup>

As Plan Patriota continued throughout 2004, the ICC prepared to launch a preliminary examination of the Colombia situation.<sup>362</sup> The preliminary examination was launched in June 2004; however, this was not made known to Colombia’s government until March 2005. At that time, President Uribe was told that the ICC had “received information on alleged crimes that could fall within the jurisdiction of the Court.”<sup>363</sup> These crimes were allegedly committed by both state and non-state armed groups.

As the ICC worked in secret to hold GoC and FARC leaders accountable for atrocity crimes, several banner events for transitional justice happened in public. On June 23, 2005 Colombia passed the Justice and Peace Law (JPL), which created a demobilization and transitional justice scheme for paramilitary groups. The JPL was the

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<sup>360</sup> The Office of the Prosecutor of the International Criminal Court. “Policy Paper on Preliminary Examinations” October 4, 2010. [https://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP\\_Draftpolicypaperonpreliminaryexaminations04101.pdf](https://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf) Accessed March 25, 2019

<sup>361</sup> Beittel, “Peace talks in Colombia” p. 5.

<sup>362</sup> The Office of the Prosecutor of the International Criminal Court. “Situation in Colombia: Interim Report.” November 2012. <https://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf> Accessed on March 25, 2019.

<sup>363</sup> Ibid, p. 2.

latest and most dramatic in a long line of government attempts to legislate an end to the war, and by the time of its issuance, the paramilitaries had grown used to interpreting and strategizing around the government's creation of laws governing the terms of the conflict.<sup>364</sup> Unlike its predecessors, the JPL was explicitly designed to help the paramilitaries lay down arms and re-enter Colombian society. Applying only to paramilitary fighters, and not the FARC, the JPL "placed a statute of limitations on prosecuting individuals, required lighter sentences than courts had normally been imposing, and blocked extradition for those wanted by the United States."<sup>365</sup> In the event that the ICC issued arrest warrants for paramilitary leaders, the terms of the JPL also protected them from extradition to the Hague.

Although the terms of the JPL would have made it materially more difficult for the ICC to carry out prosecutions of Colombian paramilitary leaders, the ICC issued no protest, condemnation, or indeed, comment, about the new law. However, a slew of statements from human rights advocates advanced messages in line with the Court's founding principles—that those who were responsible for atrocities should be held accountable, and should not be afforded impunity. Indeed, the JPL was met with an onslaught of criticism from human rights groups, including both NGOs and international institutions. The InterAmerican Commission on Human Rights released its own statement on the JPL, reminding the GoC of its obligations under international law, and especially as a member of the InterAmerican Commission on Human Rights.<sup>366</sup>

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<sup>364</sup> Garcia-Godos and Lid, "Transitional justice and victims' rights before the end of a conflict," p. 496.

<sup>365</sup> Metelis, *Inside Insurgency*, p. 107.

<sup>366</sup> "Statement by the InterAmerican Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia." *Organization of American States*. August 1, 2006. <http://www.cidh.org/countryrep/Colombia2006eng/Pronunciamiento.8.1.06eng.htm> Accessed March 25, 2019.

Notably, the UN Office of the High Commissioner for Human Rights (OHCHR) issued a statement titled “The regulations of the “Justice and Peace Law” do not adequately ensure due respect for the rights of victims.” The quotes around the name of the law are a notable part of the original title, and the statement asserts “the Attorney General’s Office should take into account the international obligations of the Colombian State with regard to the administration of justice and the fight against impunity.”<sup>367</sup> One of Colombia’s central international obligations was, of course, its ratification of the Rome Statute. Thus, a major international human rights advocate reminded the GoC of its Rome Statute obligations after NGOs raised concerns about impunity. Importantly, however, the ICC itself did not have to do any reminding, as other organizations had taken up the call. Furthermore, many of the JPL’s critics based their critiques on the ideals undergirding the Rome Statute—the idea that perpetrators of atrocities should expect prosecution, and that justice should not be contingent on political exigencies.

The GoC responded to some of these criticisms. In May 2006, the Constitutional Court struck down some of the most widely condemned aspects of the law, and demanded clarification of others.<sup>368</sup> Several months later, external observers said that one of the main paramilitary groups, the AUC, had fully demobilized.<sup>369</sup>

The next few years were marked with important signals of FARC’s willingness to negotiate. In 2007, FARC attempted to negotiate peace using Venezuelan President Hugo Chavez as a main external mediator. These negotiations fell through because of a conflict

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<sup>367</sup> UN High Commissioner for Human Rights Office in Colombia. “The regulations regarding the “Justice and Peace Law” do not adequately ensure due respect for the rights of victims” January 4, 2006. <http://www.hchr.org.co/publico/comunicados/2006/cp0601EN.pdf> Accessed March 25, 2019.

<sup>368</sup> “Breaking the Grip? Obstacles to Justice for Paramilitary Mafias in Colombia.” *Human Rights Watch*. October 2008. <https://www.hrw.org/reports/2008/colombia1008/3.htm> Accessed March 25, 2019.

<sup>369</sup> Ibid.

surrounding Chavez's role, but the FARC continued to send signals of its willingness to de-escalate the conflict. It released several high profile hostages throughout 2007 and 2008.

These signals also occurred, however, due to the FARC's weakening military status. In March of 2008, one of the FARC's central leaders were killed in strikes by the military, which was the first time the military succeeded in killing such a high ranking FARC commander.<sup>370</sup> In the same month, another central FARC commander was murdered by his security guard.<sup>371</sup> Then, in May, the founder of the FARC died of a heart attack.<sup>372</sup> On top of these losses of central leadership, the FARC's morale was lowered by a military operation that successfully freed Ingrid Betancourt, their highest-profile hostage.<sup>373</sup> In response to these military setbacks, the FARC and another major rebel group, the ELN, had decided to cease their hostilities against each other and concentrate their military efforts on fighting the Colombian government.<sup>374</sup>

Most likely as a function of their military weakness, the FARC offered to hold peace talks with Colombia's new president, Juan Manuel Santos, upon his election in August 2010.<sup>375</sup> However, Santos refused that offer, holding that the FARC needed to release its hostages before the GoC would enter talks. In response, the FARC stepped up its military actions. Due to its lowered military capacity, these actions increasingly took

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<sup>370</sup> Beittel, "Peace talks in Colombia"

<sup>371</sup> Ibid.

<sup>372</sup> Ibid.

<sup>373</sup> "Another hostage released in Colombia" *Amnesty International*. February 6, 2009. <https://www.amnesty.org/en/latest/news/2009/02/otro-rehen-liberado-colombia-20090206/> Accessed March 25, 2019.

<sup>374</sup> "Colombia rebel groups Farc and ELN agree 'to unite'" *BBC*. December 17, 2009. <http://news.bbc.co.uk/2/hi/americas/8417595.stm> Accessed March 25, 2019.

<sup>375</sup> Ibid.

the form of guerilla warfare. The GoC continued its military strikes against the FARC, and these strikes continued to do significant damage.

In May of 2011, President Santos sent an important signal about the future role of the ICC in Colombia by becoming the first Latin American president to sign an agreement on the enforcement of ICC sentences.<sup>376</sup> By signing this document, Colombia agreed that the Court could sentence perpetrators to serve prison time in a list of approved states that did not include Colombia. On another level, the GoC signaled its commitment to the mission of the Court, and its desire to be considered a state that was on the right side on international justice.

Shortly after signing the agreement on ICC sentencing, Colombia signed an agreement on land restitution for victims of the civil war. The objective of the agreement was to restore internally displaced people back to the land that had been taken from them in the conflict, or provide them restitution for their losses. This agreement was lauded by domestic and international human rights advocates, and also signaled that the Colombian government thought it had the military capacity to enforce the law. In order to ensure that these land restitution measures came to pass, the GoC needed to be able to hold territory from paramilitary and rebel groups.

Correspondingly, the GoC publicly changed the military tactics it used against the FARC.<sup>377</sup> President Santos announced that the military would use smaller units to fight a reduced and more guerilla-like FARC. The military continued to successfully fight the

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<sup>376</sup> “ICC president to sign enforcement of sentences agreement during his visit to Colombia” *International Criminal Court* May 16, 2011. [https://asp.icc-cpi.int/en\\_menus/asp/press%20releases/press%20releases%202011/Pages/icc%20president%20to%20sign%20enforcement%20of%20sentences%20agreement%20during%20his%20visit%20to%20colombia.aspx](https://asp.icc-cpi.int/en_menus/asp/press%20releases/press%20releases%202011/Pages/icc%20president%20to%20sign%20enforcement%20of%20sentences%20agreement%20during%20his%20visit%20to%20colombia.aspx) Accessed March 25, 2019.

<sup>377</sup> Acosta, Luis Jaime. “Colombia’s Santos seeks new tactics against rebels.” *Reuters* August 7, 2011. <https://www.reuters.com/article/colombia-conflict/colombias-santos-seeks-new-tactics-against-rebels-idUSN1E7760BJ20110808> Accessed March 25, 2019.



FARC, which was steadily weakening and driven into the most rural areas of Colombia. The FARC was likely feeling significant military strain, and facing challenging questions about its future.

It was in this context that, in September of 2011, Jose Noruega, the GoC's former head of intelligence and a close ally of President Uribe, was sentenced to 25 years of imprisonment for his role in ordering atrocities committed by paramilitary groups.<sup>378</sup> This sentencing further exposed the extent of GoC collaboration with paramilitaries, but also evidenced that state actors could be held accountable for their human rights abuses in the conflict. Noruega's sentencing was another important indication that justice in Colombia would not be unilaterally applied, and was not merely a tool that the state used to repress its enemies. Further, the close attention paid to this case, and the international response to the verdict, shows that even if the GoC had wanted to use its justice system as a lever of power against the FARC, there would be a vocal chorus of human rights advocates to loudly critique any excesses. Although this chorus spoke up to celebrate the Noruega verdict, the ICC again remained silent.

Two months later, the Colombian military again succeeded in killing the FARC's central commander, who was then succeeded by Timoleón Jimenez, known as Timochenko.<sup>379</sup> The FARC was significantly weakened, and in January of 2012, it again

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<sup>378</sup> "Colombia imprisons ex-spy chief Jose Noruega" *BBC*. September 14, 2011. <http://www.bbc.com/news/world-latin-america-14910863> Accessed March 25, 2019; Romero, Simon "Ex-Spy Chief of Colombia Sentenced to Prison" *New York Times*. September 15, 2011. <http://www.nytimes.com/2011/09/15/world/americas/jorge-noguera-convicted-in-colombia-spy-scandal.html> Accessed March 25, 2019; "Colombia's former intelligence chief sentenced to 24 years in jail" *Guardian* September 14, 2011 <https://www.theguardian.com/world/2011/sep/14/colombia-jorge-noguera-jailed> Accessed March 25, 2019.

<sup>379</sup> "Top FARC leader Alfonso Cano killed in Colombia" *BBC* November 5, 2011. <http://www.bbc.com/news/world-15604456> Accessed March 25, 2019; "Colombia's president hails killing of Farc leader Alfonso Cano" *Guardian* November 5, 2011 <https://www.theguardian.com/world/2011/nov/05/colombia-president-farc-alfonso-cano> Accessed March

joined with ELN to concentrate its fight against the government. Meanwhile, both sides laid the groundwork for peace.

In June of 2012, the Colombian Congress approved a peace framework law, which established an outline of an eventual peace process between the GoC and the FARC. This framework specifically concentrated on a transitional justice structure, which was an important signal that transitional justice would not be arbitrarily or unilaterally applied and designed.<sup>380</sup> At the end of the summer of 2012, it emerged that this law was passed while the GoC was in an ongoing dialogue with the FARC about arranging formal peace negotiations.<sup>381</sup> On September 4, 2012, President Santos and Timochenko announced that formal peace talks would begin that October in Norway.<sup>382</sup>

Formal peace talks began on October 25, 2012.<sup>383</sup> A week after these talks started, HRW released a public letter to Santos that was extremely critical of the transitional justice framework designed in that summer's law, and with a proposed constitutional amendment to expand military jurisdiction.<sup>384</sup> This letter critiqued the potential use of military courts to try crimes committed by military members during the conflict, again showing that there was a loud constituency of human rights advocates who would ensure

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25, 2019; Simpson, Jack. "Alfonso Cano: Dramatic footage finally released showing the operation that killed the notorious rebel leader." *Independent* October 21, 2014.

<http://www.independent.co.uk/news/world/americas/alfonso-cano-dramatic-footage-finally-released-showing-the-operation-that-killed-the-notorious-rebel-9808504.html> Accessed March 25, 2019.

<sup>380</sup> Beittel, "Peace talks in Colombia," p. 15.

<sup>381</sup> "Colombia-Farc peace talks being arranged, says president" *Guardian* August 28, 2012.

<https://www.theguardian.com/world/2012/aug/28/colombia-farc-peace-talks-president> Accessed March 25, 2019; Beittel, June. "Peace talks in Colombia," *Congressional Research Service*. March 31, 2015.

<https://fas.org/sgp/crs/row/R42982.pdf> Accessed March 25, 2019, p. 2

<sup>382</sup> Beittel, "Peace talks in Colombia," p. 15.

<sup>383</sup> Office of the Prosecutor of the International Criminal Court. "Report on Preliminary Examination Activities 2016." *International Criminal Court*. November 14, 2016. [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf), 52 Accessed March 25, 2019.

<sup>384</sup> Vivanco, Jose Miguel. "Colombia: Letter to President Santos Criticizing the Expansion of Military Jurisdiction." *Human Rights Watch* October 25, 2012. <https://www.hrw.org/news/2012/10/25/colombia-letter-president-santos-criticizing-expansion-military-jurisdiction> Accessed March 25, 2019.

that the state could not use the justice system to evade accountability without encountering vociferous resistance. Again, the ICC remained silent.

As peace negotiations continued, the proposed amendment expanding the jurisdiction of military courts continued its march toward ratification. At the end of December 2012, this measure passed in the legislature, and was met with loud criticism from human rights advocates.<sup>385</sup> Again, these advocates protested the extent to which the amendment might facilitate the impunity of military members. Although the ICC remained silent, the chorus of critics again made arguments that aligned closely with the Rome Statute—that there should be no impunity for people responsible for large-scale violations of human rights, and that the state is responsible for ensuring that there is no impunity.<sup>386</sup>

The ICC had been quiet throughout all of these public discussions of transitional justice and criminal accountability, although it had an ongoing preliminary examination. A remarkable break in this pattern occurred on June 26, 2013, which Prosecutor Bensouda sent a letter to Colombia’s Constitutional Court, reminding the Court of its Rome Statute Commitments, and arguing that the GoC could not offer amnesty to military leaders without reneging on its international legal obligations.<sup>387</sup> In her letter, which was leaked to the press, Prosecutor Bensouda warned that justice outcomes that too closely resembled impunity threatened to “invalidate the authenticity of the national

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<sup>385</sup> Beittel, “Peace talks in Colombia,” p. 15.

<sup>386</sup> “Expanding Military Jurisdiction in Colombia: A Major Setback for Justice” January 28, 2013. [https://www.wola.org/sites/default/files/1\\_2013%20Public%20statement%20FINAL.pdf](https://www.wola.org/sites/default/files/1_2013%20Public%20statement%20FINAL.pdf) Accessed March 25, 2019.

<sup>387</sup> “Una ‘carta bomba.’ *La semana* August 17, 2013. <http://www.semana.com/nacion/articulo/una-carta-bomba/354430-3> Accessed March 25, 2019.

judicial process.” Prosecutor Bensouda re-iterated this advice in a letter dated August 7, which was also leaked to the press.

When the letter appeared in Colombian newspapers, it provoked a domestic outcry. Colombian observers wryly noted that the advice that Prosecutor Bensouda provided the Constitutional Court was not solicited by it, or by any other Colombian actor.<sup>388</sup> Colombians were dismayed by how the Prosecutor’s recommendations might threaten the peace process. By arguing that military leaders needed to experience prosecution and, if found guilty, be sentenced to punishments commensurate with their crime, Prosecutor Bensouda was publicly (albeit unintentionally publicly) opposing an important incentive propelling leaders to the successful conclusion of peace talks—the promise of favorable post-conflict fates. The idea that someone from outside of Colombia could throw a wrench in the delicate balance of good faith that had been established between the government and rebels outraged many Colombians. The ICC remained silent in the face of this criticism, and a similar letter was never again leaked to the public.

As negotiations continued, each side continued to show good faith to the other through mutual ceasefires. Importantly, on February 23, 2015, the head of the FARC’s negotiating delegation expressed his confidence that FARC members would not face imprisonment, saying “for fighters, no jail. No peace process in the world has ended with the leaders of an insurgency behind bars.”<sup>389</sup> This statement was reported as evidence of the FARC’s confidence in the peace process, although it still contains the possibility that rebel fighters would meet a bloodier and more definitive end than prison.

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<sup>388</sup> Ibid.

<sup>389</sup> “ ‘Para los guerrilleros cero carcel’: Ivan Marquez” *La semana* February 23, 2015. <http://www.semana.com/nacion/articulo/ivan-marquez-dice-que-guerrilleros-de-las-farc-no-pueden-ir-la-carcel/418869-3> Accessed March 25, 2019.

In the ICC's next major public statement about the Colombia situation, in May of 2015, the Court reverted back to its quiet, unobtrusive stance. In a conference, the Deputy Prosecutor said of the situation, "the relationship between peace and justice is a settled issue under the Rome Statute."<sup>390</sup> He went on to explain that the 2005 Justice and Peace Law did not violate complementarity norms, and that the ICC is not concerned when a state decides to offer amnesties for crimes that fall outside of the jurisdiction of the Rome Statute. This statement is an important indicator of the Court's measured and conservative approach to the preliminary examination into Colombia. First, it is important that it was delivered by the Deputy Prosecutor, and not the Prosecutor herself; this helped the Court to avoid drawing significant international attention to its role in Colombia. Further, the explicit declaration that the Court would not oppose—privately or publicly—the extension of amnesties to anyone who had not committed crimes under the Rome Statute effectively signaled that in the Colombian peace process, the framers of the peace agreement would be able to extend amnesties to all but the highest-ranking leaders of the conflict without any protest from the ICC. This was a significant signal that the Court was willing to give negotiators wide latitude, and was interested in being a consistent overseer of the peace process without acting as a spoiler, or complicating an already densely complex situation.

In September 2015, the rebels and the government set up special courts to try crimes committed during the conflict, and also created truth and reconciliation

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<sup>390</sup> Stewart, James. "Transitional Justice in Colombia and the Role of the International Criminal Court" *Office of the Prosecutor of the International Criminal Court* May 13, 2015. <https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf> Accessed March 25, 2019.

commissions.<sup>391</sup> Again, human rights advocates expressed concerns that these courts would facilitate impunity, and would not allow victims to achieve justice but would instead facilitate an overly smooth reintegration of the perpetrators.<sup>392</sup> The ICC was again silent, and did not modify its assertion that amnesty was acceptable for all but the worst perpetrators of the worst crimes.

Then, in December 2015, the FARC and the GoC signed a key portion of the peace agreement encoding a justice system and a scheme of reparations for victims of the conflict.<sup>393</sup> While this agreement was met with the usual critiques from human rights advocates that it would enable impunity,<sup>394</sup> others heralded it.<sup>395</sup>

There was dissent even within Colombia's government on the post-conflict justice agreement signed in December 2015, and those who opposed the agreement appealed to the ICC. Notably, on January 19, 2016, Colombia's Attorney General sent a public letter to Prosecutor Bensouda saying that the December 2015 accountability agreement constituted an impunity pact with the FARC, arguing that it violated the Rome Statute,

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<sup>391</sup> "The Special Jurisdiction for Peace in Colombia: Recommendations for the Selection of Judges of the Chambers and Divisions of the Tribunal for Peace" *Due Process of Law Foundation* March 6, 2013. [http://www.dplf.org/sites/default/files/the\\_special\\_jurisdiction\\_peace\\_colombia\\_web\\_06\\_03\\_2016\\_0.pdf](http://www.dplf.org/sites/default/files/the_special_jurisdiction_peace_colombia_web_06_03_2016_0.pdf) Accessed March 25, 2019.

<sup>392</sup> "Colombia Agreement Must Guarantee Justice for Millions of Victims of the Armed Conflict" *Amnesty International* September 24, 2015. <https://www.amnestyusa.org/press-releases/colombia-agreement-must-guarantee-justice-for-the-millions-of-victims-of-the-armed-conflict/> Accessed March 25, 2019.

<sup>393</sup> Brodzinsky, Sibylla. "Colombia's government and Farc rebels reach agreement in step to end civil war." *Guardian* December 15, 2015. <https://www.theguardian.com/world/2015/dec/15/colombia-government-farc-rebels-agreement-end-civil-war> Accessed March 25, 2019.

<sup>394</sup> "Colombia: Agreeing to Impunity" *Human Rights Watch* December 22, 2015. <https://www.hrw.org/news/2015/12/22/colombia-agreeing-impunity> Accessed March 25, 2019; "Human Rights Watch Analysis of Colombia-FARC Agreement" *Human Rights Watch* December 21, 2015 <https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement> Accessed March 25, 2019.

<sup>395</sup> "Statement on the Transitional Justice Agreement between the Colombian government and the FARC" *International Crisis Group* September 24, 2015. <https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/statement-transitional-justice-agreement-between-colombian-government-and-farc> Accessed March 25, 2019.

and presenting fifteen reasons why the ICC should reject the agreement.<sup>396</sup> He wrote that the agreement would provoke the commission of more atrocity crimes because upon signing it, rebel groups would gain “the certainty of not being subject to prison sentences and thus guarantees them impunity for past, present, and future crimes.” He also wrote that in limiting the GoC’s investigative power over rebel crimes, the agreement violated the Rome Statute.

The ICC did not publicly respond to the Attorney General’s appeal. However, less than a month later, Prosecutor Bensouda met with Colombia’s Minister of Justice to discuss the implementation of the Jurisdicción Especial para la Paz (JEP), a new government office outlined by the agreement on post-conflict justice that would be responsible for implementing the peace agreement’s accountability provisions.<sup>397</sup> The Minister of Justice travelled to the Hague to present an outline of the new system of the Office of the Prosecutor, and reiterated Colombia’s commitment to comply with the Rome Statute.

Still, the ICC’s preliminary examination into the Colombian situation continued. In June 2016, the Prosecutor of the ICC released a statement saying that the GoC needed to act decisively in cases of false positives and of FARC sex crimes to avoid a formal investigation by the ICC.<sup>398</sup> It is significant that this statement focused on an atrocity attributed to state actors—the false positives—and an atrocity attributed to the FARC—sex crimes during the conflict. It is also significant that the ICC called on the GoC to act

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<sup>396</sup> “ ‘Acuerdo con Farc es un pacto de impunidad’: Procurador a la CPI” *El Tiempo* January 19, 2016. <http://www.eltiempo.com/archivo/documento/CMS-16485333> Accessed March 25, 2019.

<sup>397</sup> “Minijusticia explico Jurisdicción para la paz ante fiscal de la CPI” *El Tiempo* February 17, 2016 <http://www.eltiempo.com/archivo/documento/CMS-16512797> Accessed March 25, 2019.

<sup>398</sup> “Colombia no sera investigada si juzga los ‘falsos positivos’: Corte Penal Internacional” *El Colombiano* June 6, 2016 <http://www.elcolombiano.com/colombia/colombia-no-sera-investigada-si-juzga-los-falsos-positivos--corte-penal-internacional-FY4265601> Accessed March 25, 2019.

in these cases, instead of saying that the Court would act. The inclusion of both crimes in this statement makes clear that the ICC was not targeting a particular side in the conflict, and was committed to accountability for both the rebels and the government. Urging the GoC to act to avoid a formal ICC investigation made it clear that the Court was committed to promoting justice, and not necessarily ensuring international prosecution.

The last week of August 2016 was a heady one for Colombia. After 52 years of civil war, and 54 months of the most current round of peace negotiations, the GoC and the FARC reached an agreement that both would sign.<sup>399</sup> The framers of the peace agreement had the ICC's blessing. On September 1, 2016, Prosecutor Bensouda released a statement affirming the Court's support to the public, and subtly reminding stakeholders of the Court's role in the process. It read, in part:

The paramount importance of genuine accountability – which by definition includes effective punishment – in nurturing a sustainable peace cannot be overstated. As a State Party to the Rome Statute of the International Criminal Court, Colombia has recognised that grave crimes threaten the peace, security and well-being of the world and stated its determination to put an end to impunity for the perpetrators and thus contribute to the prevention of such crimes. I note, with satisfaction, that the final text of the peace agreement excludes amnesties and pardons for crimes against humanity and war crimes under the Rome Statute... I have supported Colombia's efforts to bring an end to the decades-long armed conflict in line with its obligations under the Rome Statute since the beginning of the negotiations. I will continue to do so during the implementation phase in the same spirit.”<sup>400</sup>

These words reflect not only the Court's priorities, but also its role within the peace process. In congratulating the architects of the peace agreement for constructing a document that accorded with the Rome Statute, Prosecutor Bensouda continued to play

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<sup>399</sup> “Colombia’s 52-Year-Old conflict with the FARC comes to an End” *Washington Office on Latin America* August 24, 2016. <http://colombiapeace.org/2016/08/24/colombias-52-year-old-conflict-with-the-farc-comes-to-an-end/> Accessed March 25, 2019.

<sup>400</sup> Bensouda, Fatou. “Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia—People’s Army” *International Criminal Court* September 1, 2016. <https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia> Accessed March 25, 2019



the role that the Court had throughout the peace process—to be a consistent but fairly unobtrusive presence that reminded the players of the ways that the Rome Statute bound or threatened them, cajoled them when they did not act accordingly, and congratulated them when they did. Like the tone of this statement, the ICC’s role in the Colombian peace process was carefully calibrated. This calibration was one of many reasons that the Prosecutor was able to issue a statement that celebrated rather than condemned its outcome, and why the Court ultimately acted as more of a guarantor than a spoiler of this peace process.

### **5.0 The ICC as guarantor: implementing the agreement**

After the peace agreement was signed, the ICC’s role as a guarantor of the peace process was heightened. From September 2016, through to the end of 2017, both Colombian civil society and the FARC have made direct, public appeals to the Court to intervene when they thought that the state’s stance violated the Rome Statute or threatened transitional justice. Further, the GoC’s public displays of acquiescence with the ICC’s monitoring of the peace process also indicate an understanding of the ICC as a guarantor of the peace process—by showing that it respected the ICC, the GoC could show that it respected international law, which could be designed to lend increased legitimacy to the implementation of the peace agreement.

The peace agreement established the JEP, which was to be the central transitional justice mechanism responsible for investigating members of the FARC, government forces, and third parties for their actions in the conflict, and, if necessary, for holding them accountable. Upon the peace agreement’s ratification in 2016, the process of

forming the JEP was underway, but the JEP needed Senate ratification to become fully active.

Early on in the process of forming the JEP, in November 2016, Prosecutor Bensouda released a statement saying that she had not yet taken a position on how it was constituted, but that she would continue to review the process of its formation to make sure that there were no gaps between the final form of the JEP and the Rome Statute.<sup>401</sup> In the same statement, the Prosecutor also reiterated the Court's request for more information on the false positives cases, as well as the Court's commitment to investigating sex crimes committed by the FARC.

After this initial statement, the ICC remained publicly silent on the implementation of the peace agreement and on the construction of the new transitional justice system. Nonetheless, in January 2017, HRW wrote to the Colombian Congress protesting how GoC implementation of the transitional justice provisions of the peace agreement violated international legal standards surrounding command responsibility.<sup>402</sup> Command responsibility, which was to become a contentious issue in the coming months, is the legal concept that commanders can be held responsible for the crimes of their subordinates under certain conditions. What was under debate was whether the conditions specified under Colombian law during which commanders could be held responsible for their subordinates' crimes adhered to the Rome Statute's standards on when commanders

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<sup>401</sup> Rendon, Olga Patricia. "La Corte Penal Internacional no le ha dado el visto Bueno de acuerdo" *El Colombiano* November 16, 2016. <http://www.elcolombiano.com/colombia/nuevo-acuerdo-entre-gobierno-y-farc-corte-penal-internacional-no-le-ha-dado-el-visto-bueno-CF5373242> Accessed March 25, 2019; "Fiscalía de la CPI evaluará cambios al Nuevo acuerdo de paz" *El Colombiano* November 15, 2016. <http://www.elcolombiano.com/colombia/acuerdos-de-gobierno-y-farc/fiscalia-de-la-cpi-evaluara-cambios-al-nuevo-acuerdo-de-paz-GL5368901> Accessed March 25, 2019.

<sup>402</sup> "HRW denuncia que proyecto impide que militares respondan por crímenes" *El tiempo* January 25, 2017. <http://www.eltiempo.com/mundo/eeuu-y-canada/human-rights-watch-sobre-responsabilidad-de-militares-en-conflicto-de-colombia-30598> Accessed March 25, 2019.

should be held responsible. This debate stood to impact leaders' exit options, because human rights advocates held that the JEP's definition of command responsibility was too narrow, and if the definition was broadened—meaning that the circumstances under which commanders could be held accountable for their subordinates' actions was expanded—that meant that more leaders could be prosecuted in domestic courts. In particular, human rights advocates and FARC leaders worried that the current definition of command responsibility would allow Colombian leaders to evade accountability for atrocities committed under their command.

In response to these events, in January of 2017, Prosecutor Bensouda published a piece in *La Semana*, a major Colombian newspaper, in which she argued that accountability was key for peace.<sup>403</sup> She also argued that several of Colombia's main accountability laws were directly related to the ICC's preliminary examination, and that it was her responsibility as prosecutor to make sure that all of Colombia's laws complied with the Rome Statute. She expressed concern that Colombia's concept of command responsibility did not align with the Rome Statute, and clarified that the ICC's concept of command responsibility says that commanders are responsible for the crimes of their subordinates when commanders “had the material capacity to prevent or punish crimes.”

In September 2017, Prosecutor Bensouda visited Colombia to monitor the implementation of the peace deal and discuss the ICC's ongoing preliminary examination. President Santos received her in his official residence.<sup>404</sup> On her visit,

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<sup>403</sup> Bensouda, Fatou. “El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad” *La semana* January 21, 2017. <https://www.semana.com/nacion/articulo/deseo-corte-penal-internacional-justicia-transicional-en-colombia/512820> Accessed March 25, 2019.

<sup>404</sup> “Santos se reune con la fiscal de la Corte Penal Internacional” *El Colombiano* September 11, 2017. <http://www.elcolombiano.com/colombia/paz-y-derechos-humanos/fiscal-corte-penal-internacional-se-reunion-con-presidente-de-colombia-YK7279724> Accessed March 25, 2019.

Prosecutor Bensouda asked for more information on the false positives cases, and specifically on the possibility that high-level commanders had evaded accountability. She also said that the ICC was examining the FARC's recruitment of minors during the conflict.<sup>405</sup> She also said that she would continue to carefully monitor the implementation of the peace accords. During her visit, she publicly praised the work of Colombia's courts, saying

I was impressed by the commitment, the invaluable experience, and the high standards of the Colombian courts. Their commitment to ensure genuine accountability in relation to the largest criminals, as well as respect for the victims.<sup>406</sup>

She affirmed that the ICC Prosecutor's office would act "in faith with the government and the Colombian people on a path that leads to sustainable peace."

Still, on October 18, Prosecutor Bensouda sent Colombia's Constitutional Court a letter asking for clarification on six aspects of the JEP: the definition of Colombia's concepts of command responsibility, war crimes, active or decisive participation in crimes, as well as the effective restriction of freedoms and rights of people in the JEP system.<sup>407</sup> On October 23, Colombia's Minister of Justice responded, writing that Colombia was "always ready to meet the requirements of the ICC" and that "we respect the opinions of the ICC and we respect what the Constitutional Court finally decides on the legislative act."

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<sup>405</sup> Rendon, Olga Patricia "Reclutamiento, en la mira de CPI" *El Colombiano* September 14, 2017 <http://www.elcolombiano.com/colombia/reclutamiento-en-la-mira-de-la-cpi-MA7301538> Accessed March 25, 2019.

<sup>406</sup> "Fiscal de Corte Penal Internacional respaldo proceso de paz con Farc" *El tiempo* September 13, 2017 <http://www.eltiempo.com/justicia/investigacion/fiscal-de-corte-penal-internacional-respaldo-proceso-de-paz-con-farc-130328> Accessed March 25, 2019.

<sup>407</sup> *ibid.*

On the same day, the Prosecutor's Office of the ICC released a 22-page document reviewing the JEP and how it accorded with the Rome Statute.<sup>408</sup> Much of the document concerned the concept of command responsibility, particularly as it related to paramilitary commanders. The document also questioned several other aspects of the JEP, including its definition of "grave" crimes. This document's message was amplified when *El Colombiano*, a major Colombian newspaper, published an editorial urging the government to fix the problematic aspects of the JEP, saying that several of them had been correctly identified by the ICC Prosecutor.<sup>409</sup>

On November 8, the Colombian government responded to the questions put forward by the ICC's document on the JEP.<sup>410</sup> This did not quell the controversy, and the FARC remained extremely concerned that the loose definition of command responsibility would allow senior Colombian military officials to evade responsibility for crimes committed, and that this would call the legality and legitimacy of the whole peace process into question. Thus, Rodrigo Lodoño, the FARC's highest commander, wrote a public letter to the ICC warning of the risk of impunity from Colombia's implementation of the peace accord, and specifically the JEP.<sup>411</sup> Lodoño wrote that the JEP "was conceived as an exceptional mechanism of transitional justice, whose objective was not only to end the conflict, but to ensure that impunity ends for state crimes and for serious

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<sup>408</sup> "Corte Penal Internacional, preocupada por la JEP" *El Colombiano* October 23, 2017 <http://www.elcolombiano.com/colombia/acuerdos-de-gobierno-y-farc/linea-de-mando-y-graves-crimenes-de-guerra-son-las-preocupaciones-de-la-corte-penal-internacional-CC7545613> Accessed March 25, 2019.

<sup>409</sup> "JEP, Cada vez mas interrogantes" *El Colombiano* October 26, 2017 <http://www.elcolombiano.com/opinion/editoriales/jep-cada-vez-mas-interrogantes-LX7563841> Accessed March 25, 2019.

<sup>410</sup> "Gobierno le contest a la Corte Penal Internacional" *El Colombiano* November 8, 2017 <http://www.elcolombiano.com/colombia/gobierno-le-contesto-a-la-corte-penal-internacional-FY7652034> Accessed March 25, 2019.

<sup>411</sup> "Farc advierte riesgo de impunidad en Colombia en casta a la CPI" *El tiempo* November 20, 2017 <http://www.eltiempo.com/politica/proceso-de-paz/farc-advierte-riesgo-de-impunidad-en-colombia-en-carta-a-la-cpi-153034> Accessed March 25, 2019.

violations of international law by third parties.” He argued that the Constitutional Court’s ruling that excluded non-military state agents and third parties from the JEP’s jurisdiction opened the door to impunity and “mocks the rights of victims.” Lodoño requested a meeting with Prosecutor Bensouda to discuss this issue, and also requested that the UN intervene.

A week later, a coalition of 141 major victims’ organizations and human rights organizations created an international legal team to bring the cases that would not come before the JEP before the ICC. They wrote a public letter to Prosecutor Bensouda informing her that they would do this, a clear signal that stakeholders in the peace process saw the ICC as a guarantor of post-conflict justice.<sup>412</sup> Again, this also cast the ICC in the role of justice promoter, and is perhaps the starkest example possible of human rights advocates pushing international prosecution while the Court itself promotes accountability broadly, while remaining more agnostic about its form. The ICC did not comment on the creation of this legal team, which meant that in this situation, the Court itself was not threatening leaders’ exit options.

The debate over the Constitutional Court’s ruling on the JEP, and the ICC’s role in commenting on that ruling, was a highly important political event in Colombia. Major newspapers dedicated considerable space to analysis pieces,<sup>413</sup> explanatory pieces,<sup>414</sup>

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<sup>412</sup> Ibid.

<sup>413</sup> “La fiscal de la CPI no habla a nombre de toda la CPI” *La Semana* November 3, 2017 <https://www.semana.com/nacion/articulo/kai-ambos-explica-las-observaciones-de-la-corte-penal-internacional-a-la-jep/545925> Accessed March 25, 2019.

<sup>414</sup> Uruena, Juan Manuel Charry. “Mas es menos. Estatuto de Roma y Jurisdicción Especial de la Paz” *La semana*. October 24, 2017. <https://www.semana.com/opinion/articulo/estatuto-de-roma-y-jurisdiccion-especial-de-paz/544689> Accessed March 25, 2019.

commentary,<sup>415</sup> and editorials on how the government should or should not proceed with the Constitutional Court's ruling and adapt the JEP, as well as on the role of the ICC in this debate.<sup>416</sup>

For this dissertation, what is most notable about this debate is how the FARC leadership explicitly turned to the ICC to serve as a guarantor of the peace. FARC leaders were concerned about GoC overreach in protecting their own from criminal accountability, and to prevent this, they publicly appealed to the Prosecutor of the ICC and explicitly appealed to the terms of the Rome Statute. In his letter, Lodoño used international law as the standard to which Colombia should comply in its implementation of the JEP, and clearly identified the Prosecutor of the ICC as the enforcer of that standard. This constitutes clear recognition of the ICC's role as a guarantor of the peace process, and especially of their role in preventing state circumvention of accountability.

Further, the coalition of victims and human rights advocates also showed that Colombia's civil society saw the ICC as a guarantor of the peace. Their public efforts to use the ICC to try the crimes that, according to the Constitutional Court's ruling, could not be tried under the JEP, showed that they understood the ICC's role as an international enforcer that could ensure that the peace agreement's provisions on accountability were met, even when the Colombian government seemed unwilling to meet them.

Finally, it should be noted that the Colombian government's hosting of ICC visits and very publically prompt responses to ICC requests for information or clarification can

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<sup>415</sup> Gomez, Jairo. "La JEP en la lupa de la CPI" *La Semana* October 24, 2017. <https://www.semana.com/opinion/articulo/la-jep-en-la-lupa-de-la-cpi-de-jairo-gomez/544679> Accessed March 25, 2019.

<sup>416</sup> Bortero, Jorge H. "Tormenta perfecta" *La Semana* October 24, 2017 <https://www.semana.com/opinion/articulo/tormenta-perfecta-de-jorge-h-bortero/545112> Accessed March 25, 2019.

be construed as attempts to use the ICC as a guarantor of the peace. In showing that they were cooperating with the ICC, the Colombian government could demonstrate that they prioritized ensuring that the implementation of the peace agreement, particularly its justice and accountability provisions, fell within the bounds of international law. Gaining the ICC's public stamp of approval—such as when Prosecutor Bensouda publicly commended the work of Colombia's courts—could help legitimate the state's actions regarding post-conflict justice mechanisms. In this way, the Colombian government also sought to use the ICC as a guarantor of the peace.

## **6.0 Conclusion**

This chapter is meant to show how the ICC can act as a guarantor in formal peace negotiations between rebel groups and the state in a civil war. In Chapter 2, I outlined the theoretical expectation that the ICC could act as a guarantor in peace negotiations when the ICC plays an oversight, rather than prosecutorial, role in peace negotiations. The ICC can play an oversight role in peace negotiations when the ICC is only investigating a situation, and has not issued charges, when the Prosecutor uses lenient, subtle signals to remind the players of their Rome Statute obligations, and when human rights and peace advocates amplify the ICC's anti-impunity stance, thus allowing the ICC itself to remain quiet.

To illustrate this theoretical mechanism, this chapter traced the ICC's role in the formal peace process between Colombia and the FARC from August 2012 to September 2016, and also began to examine the ICC's role in the implementation of the peace agreement. I first showed how the FARC was very legally habituated, in part due to Colombia's particular context and previous experiences with the IACtHR. Then, I



showed how the ICC successfully used subtle and lenient signaling, by issuing statements that simply reminded the parties of their Rome Statute obligations, by requesting clarification or further information, and by staying silent as human rights advocates condemned proposals for peace that would not have respected the Rome Statute.

Colombia arrived at a comprehensive peace agreement, and further, both the Colombian government and the FARC appealed to the ICC throughout the peace process to act as a guarantor of the implementation of the accord. This shows that the ICC did indeed act as a guarantor throughout the Colombian peace process, and that both the FARC and the Colombian government recognized and helped shape this role.

This case shows that when the ICC emphasizes justice over prosecution, and when other human rights advocates amplify its anti-impunity message, the ICC can act as a guarantor in peace negotiations. However, since this is only a single case, there are other factors that emerge as important. Notably, Colombia's legal environment and the complementary role of the IACtHR, a regional human rights tribunal, were important conditioning factors in the FARC's legal habituation, the skilled advocacy of civil society organizations, and the role of the ICC.

This case also raises important questions about alternative explanations. In this chapter, I argued that the ICC could play an oversight role in the peace negotiations because of the more vocal advocacy of other human rights actors. This begs the question of whether the ICC was simply epiphenomenal, and whether these actors' calls for accountability were what mattered in keeping belligerents at the table, not the prospect of accountability at the ICC. To address these questions, I now turn to the case of Sri Lanka,

where there was a cacophony of voices crying out against impunity, and no ICC involvement whatsoever.

## **CHAPTER 6 | THE ACCOUNTABILITY VACUUM IN SRI LANKA**

### **1.0 Introduction**

In this dissertation, I argue that the ICC has distinctive effects on the onset and outcomes of peace negotiations because it is an international actor with the power to mount criminal prosecutions. I argue that it is the Court's international nature and its prosecutorial nature combined that result in its distinctive influence on peace negotiations. I also argue that the Court's influence on peace negotiations is conditioned by the role of other human rights advocates, especially domestic and international NGOs, international organizations, and even external states.

In the chapters on Uganda and Colombia, the role of other human rights promoters emerges as essential in conditioning the ICC's effect on the onset and outcomes of peace negotiations. Indeed, I argue that the ICC played a very different role—and resulted in very different peace outcomes—precisely because the constellation of other human rights actors also behaved so differently in each case. This argument begs the question of whether the Court was epiphenomenal in these cases, and whether its role in peace negotiations generally is epiphenomenal. It is possible to argue that the ICC does not exert a particular and separable influence on peace negotiations, and that whatever effect I argued the ICC has on peace negotiations is actually down to the role of other actors. Instead, I argue that the ICC's very involvement in peace negotiations enhances the power of other human rights actors to influence the peace process, and particularly that it sharpens the impact of their messaging on accountability for human rights abuses.

To make this argument, and to show that the ICC's effect on peace negotiations is not epiphenomenal, this chapter will discuss the case of Sri Lanka. Sri Lanka saw a

twenty-seven year civil war, and several attempts at peace, including one extremely internationalized peace process that lasted from 2000 to 2006. All of the actors that condition the influence of the ICC were extremely involved in this peace process: domestic human rights organizations, international human rights organizations, international institutions, and external states. However, Sri Lanka was not a signatory to the Rome Statute, the ICC never even informally examined human rights abuses in Sri Lanka, and there was not significant advocacy for ICC involvement or international prosecution in Sri Lanka.

As such, Sri Lanka serves as an excellent case to test a main counterargument to my dissertation's claims: if the ICC's effect is epiphenomenal, and without the ICC, human rights advocates would have the same effect on peace negotiations, then we should observe that human rights accountability would play a central role in the Government of Sri Lanka (GoSL) and Lieutenant Tigers of Tamil Eelam (LTTE) decisions to come to and stay at the table. Instead, concerns about post-conflict accountability had no observable effect on the GoSL's and LTTE's willingness to talk peace, or on the way they behaved in peace negotiations.

This chapter closely examines the peace process that occurred from 2000 to 2006, which resulted in the signing of a ceasefire agreement in 2002 and several attempts at more substantial peace agreements throughout 2003. Although this process occurred throughout the period when the ICC was designed and implemented, and although the peace process was extremely internationalized, accountability at the ICC was never discussed throughout this peace process. Indeed, substantial conversations about criminal accountability for human rights abuses in the conflict only began after the GoSL declared

victory over the LTTE in 2009, even though domestic and international human rights advocates mobilized against impunity from the earliest days of the peace negotiations. Thus, this chapter argues that in the absence of the ICC, even in the presence of the constellation of actors that support the ICC's human rights work, international criminal accountability will not be a substantial issue on the agenda of peace negotiations, and will not affect belligerents' decisions to come to and stay at the table.

This chapter proceeds in five subsequent parts. The second part provides a brief justification of case selection, and explains the data and methods used in the chapter. The third part provides information on the foundations of the conflict and Sri Lanka's status vis a vis the Rome Statute and the ICC. The fourth part presents a case study of peace negotiations onset and outcome, as well as the outcome of the civil conflict. It details how the GoSL and the LTTE decided to come to formal peace negotiations in 2002, and shows that the prospect of prosecution played no role in leaders' decisions to come to the table. It then details the formal peace process and its dissolution, showing that the question of post-conflict accountability did not affect how the GoSL and LTTE negotiated peace, or their decisions to leave the table. Next, it details the resumption of major hostilities in April 2006, after the disintegration of the peace process, and shows how the belligerents' lack of concern for post-conflict accountability affected their wartime conduct. Finally, it discusses another short-lived attempt at peace negotiations that occurred in 2009, and then discusses the LTTE's military defeat.

The fifth part of the chapter breaks with the chronology and details five transitional justice processes that occurred during and after the conflict, and explains why none of them mattered to the conflict or the peace the way that the ICC could. The sixth

part of the chapter discusses implications for the ICC, and explains why none of the human rights actors involved in the conflict—including those who strenuously advocated against impunity—managed to raise the issue as a major topic in the peace process in the absence of the ICC. The seventh part concludes.

## **2.0 The case selection, data, and methods**

This case of the Sri Lankan civil war is included in this dissertation to serve as a counterfactual. It explores the alternate explanation that the role of the Court is epiphenomenal because it has the same constellation of actors that would help the Court act as a guarantor advocating for international accountability for culpable leaders, but the Court itself was not involved. Therefore, it provides a good test case for the alternative explanation: given all of the actors advocating for accountability in Sri Lanka, if the alternative explanation holds, we would expect the question of post-conflict justice to galvanize leaders to make peace.

I use the same methods in this chapter as I did in the Colombia chapter: I use publicly available information to construct a case narrative to show how the constellation of human rights and peace advocates that the ICC works within cannot have the same effect on civil war termination when the ICC is not present. I relied most heavily on statements and reports issued by international organizations and NGOs. The international organizations featured most prominently are the Organization for Economic Cooperation and Development (OECD), the European Union (EU), and several UN offices: United Nations International Children's Emergency Fund (UNICEF), the Security Council, the Secretary General's office, and the Office of the High Commissioner for Human Rights (OHCHR). The NGOs I drew most upon were Amnesty International (AI) and Human

Rights Watch (HRW). I also drew extensively from reports of various international commissions and panels convened specifically to investigate and advocate about the human rights situation in Sri Lanka. Most prominent among these was the extremely detailed report compiled by the Sri Lanka Monitoring Mission (SLMM), which was convened to monitor the ceasefire implemented by the Norwegian peace process.

I corroborated these sources with newspaper reports and the works of several analysts who specialize in Sri Lanka. I drew most heavily from the Colombo Telegraph, but also consulted the Washington Post, BBC, and Guardian (UK). Finally, I consulted the work of Sonia Buffard, David Carment, John Stephen Moolakkattu, Jonathan Goodhand, and Oliver Walton.

### **3.0 The context**

Sri Lanka has struggled with ethnic conflict since it became independent from the United Kingdom in 1948.<sup>417</sup> The country, whose geographic location is indicated in Figure 6.3, is dominated by the Sinhalese ethnic group, which constitutes about 80% of the population, with the Tamil and Moor minorities, which make up about 9% and 7% of the population. However, during the colonial era, the British treated the Tamil as a favored minority, which both created and exacerbated ethnic tensions that undergirded the civil war and persist to the present. When Sri Lanka became independent, the Sinhalese majority took power, and the Sinhalese government quickly took steps that politically, economically, and culturally disenfranchised the Tamil minority.

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<sup>417</sup> Bajoria, Jayshree. "The Sri Lankan Conflict." *Council on Foreign Relations*. May 18, 2009. <https://www.cfr.org/background/sri-lankan-conflict> Accessed March 25, 2019.

Figure 6.3. Map indicating the location of Sri Lanka<sup>418</sup>



In response to this discrimination, the Lieutenant Tigers of Tamil Eelam (LTTE) formed in 1976. Most of Sri Lanka's Tamil population lives in the northern and eastern regions of the country; they became LTTE's geographic and political power base. Throughout the vast majority of the conflict, the LTTE fought to make this region an independent state for Sri Lanka's Tamil minority. The LTTE was formed as a successor to an earlier Tamil nationalist group, but sought to distinguish itself as "elite, ruthlessly efficient, and highly professional fighting force."<sup>419</sup> However, during its first six years as an organization, the LTTE only carried out small-scale attacks against local government targets.

Most date the beginning of the Sri Lankan civil war to July 23, 1983, when the LTTE ambushed a Sri Lankan army patrol and killed thirteen soldiers. This led to

<sup>418</sup> This image is available at <https://www.freeworldmaps.net/asia/srilanka/location.html>

<sup>419</sup> Hoffman, Bruce. *Inside terrorism*. Columbia University Press, 2006, p. 139.



massive rioting and communal violence against Tamil civilians, culminating in large-scale casualties and a mass flight of Tamil civilians into the northern and eastern regions of the country. In the next two years, as the LTTE fought to dominate smaller Tamil militias, violence against civilians became a key part of its military strategy, with large-scale attacks on civilians winning it both notoriety and territorial control of the north and east.

In 1985, the GoSL attempted peace negotiations with the LTTE, but talks failed. As the LTTE continued to target civilians, the GoSL launched a major military offensive against the LTTE in 1987. This offensive was aided by an Indian military intervention, which led to peace talks and the signing of the Indo-Sri Lankan Peace Accord in June 1987. In this accord, the GoSL agreed to make Tamil an official language of Sri Lanka, to merge the north and the east into one province to give Tamils more political power, and to grant increased political power to the provinces. After the accord was signed, India kept a peacekeeping force in the country.

Most Tamil militant groups gave their arms to the Indian peacekeepers, but the LTTE refused to disarm. The Indian peacekeepers then attempted to disarm the LTTE by force. These hostilities continued for two years until India elected a new president, who withdrew the Indian peacekeeping force in 1990. LTTE violence continued.

Throughout 1990, the LTTE continued large scale attacks against government targets and civilians. In June 1991, a battle between 5,000 LTTE fighters and 10,000 GoSL troops left 2,000 dead. In 1992 and 1993, the LTTE succeeded in assassinating several very high-ranking military and political leaders and in November 1993, they defeated the GoSL military in a major battle.

After elections in 1994, a new GoSL administration announced a new approach to the conflict: “war for peace.”<sup>420</sup> However, in January 1995, the LTTE agreed to a ceasefire and to peace negotiations in Jaffna.<sup>421</sup> The fact that the LTTE agreed to a ceasefire when they were in a position of military strength suggests that they hoped for major GoSL concessions. However, these concessions were not forthcoming: the LTTE refused to discuss substantive political issues until an economic embargo was lifted, and the new GoSL administration refused to lift the embargo.<sup>422</sup> Attempts at negotiations continued until April 19, 1995, when the LTTE attacked a government installation.<sup>423</sup>

The GoSL began a corresponding military offensive aimed at reclaiming the LTTE-held city of Jaffna. During this offensive, there were several incidences of government troops targeting civilians, resulting in large-scale civilian casualties. AI wrote to GoSL President Chandrika Kumaratunga asking for an investigation of reports of “deliberate killings of defenceless people, whether they are civilians or combatants incapacitated by injuries or who have surrendered and offer no resistance.”<sup>424</sup>

The LTTE also committed large-scale attacks on civilians, and AI also issued an urgent action appeal calling for investigations of LTTE killings of civilians.<sup>425</sup> In response, the LTTE released a statement claiming that these killings had not violated international humanitarian law because the civilians had been supporting a side in the

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<sup>420</sup> Paramanathan, Mathivathana. “Peace Negotiations of Sri Lankan Conflict in 2000-2006: The Ceasefire Agreement Facilitated by Norway is at Stake” *Thesis submitted to Jonkoping University* March 2007 <http://www.diva-portal.org/smash/get/diva2:4488/FULLTEXT01.pdf> Accessed March 25, 2019.

<sup>421</sup> Bouffard, Sonia, and David Carment. “The Sri Lanka peace process: a critical review.” *Journal of South Asian Development* 1, no. 2 (2006): 151-177, p. 164.

<sup>422</sup> Ibid.

<sup>423</sup> Bouffard and Carment. “The Sri Lanka peace process: a critical review.” p. 165.

<sup>424</sup> Amnesty International, (REF: T/ASA37/LTTE/95.01) September 1995, “Correspondence with the Liberation Tigers of Tamil Eelam on human rights abuses.

<sup>425</sup> Ibid.

conflict.<sup>426</sup> In releasing this statement, the LTTE showed that they understood that the politics surrounding compliance with international humanitarian law were important, and that it was worthwhile to attempt to portray themselves as a force that complied with international humanitarian law. Although the LTTE's justification of this action as compliant with international humanitarian law shows an incorrect understanding of the principle of distinction between combatant and civilian, the fact that the LTTE drew on the principle of distinction in its justification of its military actions shows that it was sensitized to international law, and to the reasons that it could benefit from being perceived to comply with it.

The fighting continued. The government continued to launch military offensives in LTTE territory throughout 1996 and 1997, retaking significant amounts of LTTE territory. The LTTE fought off the offensives, and also conducted extensive suicide bombing campaigns throughout the entire country, with a special focus on the capital city, Colombo. In 1998, the tide of the military conflict began to turn, and throughout 1998 and 1999, the LTTE successfully reclaimed territory throughout the north and east of Sri Lanka. By 2000, they controlled an unprecedented amount of territory.

### **3.1 Sri Lanka and the ICC**

As the LTTE fought to reclaim territorial control of northern and eastern Sri Lanka, international human rights advocates achieved a key advance in a different kind of fight, when the Rome Statute was created in July 1998. Sri Lanka did not play an active role in the creation of the Rome Statute, and sought to avoid coming under its jurisdiction. The Rome Statute came into force on July 1, 2002, and only a few months

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<sup>426</sup> Evans, Derek G. "Correspondence with the Liberation Tigers of Tamil Eelam on human rights abuses" *Amnesty International* September 1995  
<https://www.amnesty.org/download/Documents/176000/asa370181995en.pdf> Accessed March 25, 2019.

later, on November 22, 2002, Sri Lanka signed a Bilateral Immunity Agreement (BIA) with the US.<sup>427</sup> BIAs were an attempt by the US to co-opt the Court, and limit its reach around the world,<sup>428</sup> and Sri Lanka signing a BIA showed first that they did not embrace Rome Statute norms, and second, that the GoSL cared more about aligning itself with a powerful state than about whatever reputational benefits it could garner by embracing anti-impunity norms. Further confirming this, in 2014, Sri Lanka's Prime Minister in 2002, Ranil Wickremesinghe publically said that he considered Sri Lanka's non-ratification of the Rome Statute to be a personal political achievement, and one that he undertook specifically to shield GoSL leaders from international accountability.<sup>429</sup> Sri Lanka still has yet to sign or ratify the Rome Statute. Therefore, all of Sri Lanka's peace negotiations, even after 2002, took place outside of the shadow of the ICC.

#### **4.0 The case study**

##### **4.1 Peace negotiation onset**

As the international community celebrated the creation of the ICC, exhaustion with the Sri Lankan war was at its peak. By the middle of 2000, roughly one million Sri Lankans were internally displaced by the conflict, and the peace movement was at its peak.<sup>430</sup> Both the GoSL and the LTTE worked quietly to set the scene for peace talks, and both turned to Norway to help broker these talks.

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<sup>427</sup> Balais-Serrano, Evelyn. "Rome Statute of the International Criminal Court Ratification and Implementation in Asia: Some Prospects and Concerns." *Coalition for the International Criminal Court* August 25, 2006.

[http://ncicc.org.np/pics/files/Rome%20Statute%20Ratification%20and%20Implementation%20in%20Asia.pdf\\_1376387216.pdf](http://ncicc.org.np/pics/files/Rome%20Statute%20Ratification%20and%20Implementation%20in%20Asia.pdf_1376387216.pdf), Accessed March 25, 2019, p. 3.

<sup>428</sup> Bosco, *Rough Justice*.

<sup>429</sup> Jeeran, Muheed. "Electric Chair Political Blunder to Fool Voters" *Colombo Telegraph* March 28, 2014. <https://www.colombotelegraph.com/index.php/electric-chair-political-blunder-to-fool-voters/> Accessed March 25, 2019.

<sup>430</sup> *ibid*.

Norway had first offered mediation assistance in 1991, when the Indian peacekeepers pulled out of LTTE-held areas.<sup>431</sup> Throughout the early 1990s, Norway made it clear to both the GoSL and the LTTE that it was willing to help with the peace process, and in 1995, they were asked to head a monitoring mission of the ceasefire that did not last.<sup>432</sup> After the 1995 talks collapsed, the LTTE expressed that Norway was their preferred negotiating partner, and the ICRC brokered a meeting between Jan Egeland and LTTE lead negotiator Anton Balasingham.<sup>433</sup>

The GoSL knew of the LTTE's preference for Norwegian mediation, and in May 1999, the Kumaratunga administration secretly gave Norway a formal mandate to begin a dialogue with the LTTE.<sup>434</sup> Concurrently, the GoSL approached the ICRC to help broker an arrangement to deliver humanitarian aid to designated checkpoints on the front lines of the conflict, as a gesture of goodwill to the Tamils.<sup>435</sup> These efforts were born of the GoSL's confidence that it had the military upper hand.<sup>436</sup>

However, the military balance of power changed throughout the later months of 1999, with the LTTE successfully taking more territory. In negotiations with Norway, President Kumaratunga said that she would only sign a ceasefire when they had made substantial progress on negotiations.<sup>437</sup> Shortly thereafter, the LTTE and GoSL signed an "Agreement following an understanding on humanitarian measures," in which parties

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<sup>431</sup> Sorbo, Gunnar, Jonathan Goodhand, Bart Klem, Ada Elisabeth Nissen, and Hilde Selbervik. "Pawns of Peace: Evaluation of Norwegian peace efforts in Sri Lanka, 1997-2009." *Organization of Economic Cooperation and Development Norad Evaluation Department* May 2011 <https://www.oecd.org/countries/srilanka/49035074.pdf>, Accessed March 25, 2019, p. 29.

<sup>432</sup> Ibid, p. 30

<sup>433</sup> Ibid, p. 30

<sup>434</sup> Ibid, p. 31

<sup>435</sup> Ibid, p. 31

<sup>436</sup> Ibid, p. 31

<sup>437</sup> Ibid, p. 33

agreed to stop targeting civilians and asked Norway to establish a Humanitarian Monitoring Group.<sup>438</sup>

The LTTE declared a unilateral ceasefire in December 2000, as a gesture of goodwill and commitment to ending the conflict.<sup>439</sup> Again, the LTTE acceded to peace negotiations from a position of relative military strength, suggesting that they expected considerable political concessions. However, this declaration of a unilateral ceasefire dismayed the GoSL, as it was unexpected and made it more difficult for them to negotiate from a position of strength either in terms of military power or public opinion.<sup>440</sup>

The LTTE's unilateral ceasefire was met with considerable domestic civil society advocacy for peace. Still, the minute the previous ceasefire expired in April 2001, the GoSL launched a military attack on the LTTE, which was quickly defeated.<sup>441</sup> These hostilities only emboldened domestic advocates for peace. The Center for Policy Alternatives' Peace Support Group was extremely active in 2001 advocating for peace: on January 4,<sup>442</sup> March 15,<sup>443</sup> June 7,<sup>444</sup> August 15,<sup>445</sup> and October 1,<sup>446</sup> they released statements calling for substantive peace negotiations. Throughout this time, they were also highly critical of the government: on July 18, they called for a new government,<sup>447</sup> saying that current Sri Lankan leaders should step down to facilitate the creation of an Interim Government for Peace and Reconciliation.

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<sup>438</sup> Ibid, p. 33

<sup>439</sup> Bouffard and Carment. "The Sri Lanka peace process: a critical review." p. 169

<sup>440</sup> Sorbo et al., "Pawns of Peace," p. 33

<sup>441</sup> Ibid, p. 33

<sup>442</sup> "Peace Support Group (PSG) Statements—2000 to 2006" *Centre for Policy Alternatives* October 9, 2007 <http://www.cpalanka.org/peace-support-group-psg-statements-2000-to-2006/> Accessed March 25, 2019.

<sup>443</sup> Ibid.

<sup>444</sup> Ibid.

<sup>445</sup> Ibid.

<sup>446</sup> Ibid.

<sup>447</sup> Ibid.

This did not happen, meaning that the electoral process would be key for prospects for peace. Therefore, the Center for Policy Alternatives sought to influence the peace platforms of all parties in the December 2001 parliamentary elections. On October 30, 2001, they released an open letter to all political parties suggesting an agenda for peace, containing “cardinal ideas” they argued were key for resolving the conflict. These ideas included the contention that there could be no military solution to the ethnic conflict; the creation of a cessation of hostilities and an effective monitoring mechanism; a lifting of the current embargo on goods going to the north; an end to human rights violations, particularly the conscription of child soldiers; involving an international third party in negotiating a political solution to the conflict; a power-sharing agreement for the north and east of Sri Lanka; and comprehensive plans for reconstruction, reconciliation, and remembering the dead. Notably, criminal accountability was not part of their suggested agenda.

The electoral process was indeed crucial for the lead-up to peace negotiations. The elected Prime Minister, Ranil Wickremesinghe, had been in secret peace negotiations with Norway and the LTTE prior to his election, and immediately upon his election, a temporary ceasefire was put in place.<sup>448</sup> The Center for Policy Alternatives welcomed this announcement. Further, upon his election, Prime Minister Wickremesinghe privately insisted that Norway isolate President Kumaratunga and the military from the peace process, clearing the way for negotiations to move forward.<sup>449</sup>

Now that peace negotiations were openly underway, the Center for Policy Alternatives shifted its focus to advocating that human rights be central on the agenda. In

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<sup>448</sup> Ibid.

<sup>449</sup> Sorbo et al., “Pawns of Peace,” p. 36

January of 2002, they issued a statement insisting that human rights and humanitarian stipulations be explicitly included on whatever agreement the LTTE and GoSL arrived at.<sup>450</sup>

On February 22, 2002, the GoSL and LTTE signed a full ceasefire agreement (CFA).<sup>451</sup> In addition to a ceasefire, they agreed to several confidence-building measures, including, “in accordance with international law abstain[ing] from hostile acts against the civilian population, including such acts as torture, intimidation, abduction, extortion and harassment,” “introduce[ing] systems to prevent the harassment of the civilian population,” and “refrain[ing] from engaging in activities or propagating ideas that could offend cultural or religious sensitivities.” Further, the CFA created the SLMM, which was a monitoring mission staffed by Nordic countries. Its mandate was to investigate any violations of the CFA, take immediate action based on any complaint, and help mediate disputes on the CFA. The CFA was meant to pave the way for further peace negotiations throughout 2002.

## **4.2 Peace negotiation outcome**

### **4.2.1 The Oslo Declaration**

The February 2002 CFA was an important step, but it cannot be considered a peace agreement in and of itself. Rather, it paved the way for further negotiations of a more comprehensive peace agreement throughout 2002 and 2003. Norway continued to play a substantial role, as did competing factions within both the GoSL and the LTTE. Initially, Norway facilitated monthly meetings between the GoSL and the LTTE, and

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<sup>450</sup> “Sri Lanka: Human Rights and the Peace Process” *Human Rights Watch* July 2002 <https://www.hrw.org/legacy/backgrounder/asia/srilanka/srilanka.pdf> Accessed March 25, 2019.

<sup>451</sup> “Full Text of the Ceasefire Agreement” *Guardian* February 21, 2002 <https://www.theguardian.com/world/2002/feb/22/srilanka> Accessed March 25, 2019.



planned for another round of formal negotiations in September 2002.<sup>452</sup> Prime Minister Wickremesinghe spent the preceding summer on diplomatic trips, including to India and the US, to gain security guarantees and international support for Sri Lanka's new economic program.<sup>453</sup>

The Center for Policy Alternatives continued to advocate for the implementation of the CFA and the timely negotiation of a more comprehensive peace agreement.<sup>454</sup> They were especially vocal in July, when the LTTE held two SLMM monitors captive on their ships, a clear violation of the CFA.<sup>455</sup>

In the first round of formal negotiations, which took place on September 16-18, the GoSL and LTTE discussed the implementation of the CFA and economic normalization.<sup>456</sup> Much of the purpose of this round of talks was to raise public confidence and establish good will and optimism about the peace process.<sup>457</sup> A second round of negotiations took place from October 31 to November 3, where the sides established three subcommittees to cover the substantive areas of the negotiations: the Subcommittee on Political Affairs, the Subcommittee on De-escalation and Normalization, and the Subcommittee on Immediate Humanitarian and Rehabilitation Needs.<sup>458</sup> Notably, accountability and amnesty were not items on the agenda, and none of the subcommittees were tasked with addressing them.

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<sup>452</sup> Sorbo et al., "Pawns of Peace," p. 38

<sup>453</sup> Ibid.

<sup>454</sup> "Peace Support Group (PSG) Statements—2000 to 2006" *Centre for Policy Alternatives*

<sup>455</sup> Sri Lanka Monitoring Mission Headquarters "Two SLMM Monitors Held Against Their Will Onboard a LTTE Vessel" July 14, 2002 <http://www.peaceinsrilanka.lk/negotiations/slmm-038> Accessed March 25, 2019

<sup>456</sup> Sorbo et al., "Pawns of Peace," p. 39

<sup>457</sup> Ibid., p. 40; Bouffard and Carment, "The Sri Lankan Peace Process: A Critical Review", p. 169

<sup>458</sup> Sorbo et al., "Pawns of Peace," p. 40.

The fact that, to this point, the Sri Lankan peace process did not address post-conflict accountability did not affect the international community's support. Indeed, a conference between the GoSL, LTTE, and major donors took place in November of 2002, where the GoSL garnered \$70 million in pledges of humanitarian aid.<sup>459</sup> Further, Norway, a state that is sensitized to international humanitarian norms and has carved out an international role for itself as a promulgator of those norms, did not advocate raising this issue on the agenda.

This oversight did not go unnoticed by domestic human rights advocates. In December 2002, the Tamil-dominated University Teacher's Association for Human Rights (UTahr) published a bulletin criticizing the neglect of human rights and international accountability in the peace process. It read, in part:

For a country like Norway, which portrays itself as a front-runner in human rights and child rights, legitimising repression in the interests of making peace, could cause enormous problems in the future. There are grave implications for the entire region. One hopes that before it is too late, Norway will see that the road to real peace lies in demanding accountability from all the actors, especially the Sri Lankan state and the LTTE, and not in strategic appeasement.<sup>460</sup>

In this statement, the UTahr was appealing to Norway's reputation as a human rights promoter, and, on that basis, attempting to shame it to including the post-conflict accountability on the negotiating agenda. However, this appeal was unsuccessful, and in spite of this advocacy, provisions for accountability were not seriously discussed during the peace process.

Three more rounds of formal negotiations occurred in December 2002, January 2003, and February 2003.<sup>461</sup> Neither human rights nor criminal accountability were on

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<sup>459</sup> Ibid.

<sup>460</sup> Moolakkattu, John Stephen. "Peace facilitation by small states: Norway in Sri Lanka." *Cooperation and Conflict* 40, no. 4 (2005): 385-402, p 394-395

the agenda in any of these talks, although they did focus on humanitarian needs and a political solution to the conflict. The Oslo Declaration, issued on December 5, 2002,<sup>462</sup> did not mention human rights, international humanitarian law, or criminal accountability. At the behest of Ian Martin, a UN-appointed human rights advisor, human rights was first put on the agenda during the sixth round of formal negotiations, which took place in March 2003.<sup>463</sup> At this round of talks, the GoSL and LTTE agreed to another round of talks in the late spring of 2003, and agreed that at this round, they would draft a joint statement on human rights and humanitarian principles.<sup>464</sup> Further, to bolster confidence in the peace talks, and gain more international support for a post-conflict Sri Lanka, the GoSL and LTTE attempted to schedule another donor conference in Japan.

However, the joint statement on human rights and humanitarian principles was never actually drafted, which shows how little pressure each side felt to show their commitment to human rights in the peace process. It is extremely significant that even after pressure from a UN official, and even after public pledge to create a statement on human rights, each side did not place priority on even making the low cost commitment of drafting a statement on human rights. This suggests that neither side's leaders' considered that demonstrating commitment to human rights would be important to preserving good post-conflict exit options, a calculus conditioned by the lack of ICC involvement in the conflict situation.

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<sup>461</sup> Sorbo et al., "Pawns of Peace," p. 41

<sup>462</sup> "Oslo Declaration" December 5, 2002 <http://www.tchr.net/oslo-declaration.pdf> Accessed March 25, 2019.

<sup>463</sup> Sorbo et al., "Pawns of Peace," p. 41

<sup>464</sup> Ibid.

#### 4.2.2 Fragmentation

Part of Norway's strategy in brokering the talks was to build a strong network of international support around the peace process, and part of Prime Minister Wickremesinghe's political agenda was to cultivate good relationships with donor states and international organizations.<sup>465</sup> After the Prime Minister forged connections with the World Bank at other diplomatic negotiations, a preparatory meeting for the Japan donor conference was scheduled to coincide with a World Bank conference in Washington, D.C. However, the LTTE had been designated a terrorist organization by the American government—a well-known fact—and therefore could not travel to the US to attend this meeting.

This jeopardized the peace process. In the first two weeks of April 2003, the LTTE released two press statements criticizing their clear exclusion from the Washington, D.C. meeting and saying they were reassessing attending the Japan donor conference.<sup>466</sup> The GoSL did not answer either press release, and on April 21, 2003, the LTTE's top negotiator, Anton Balasingham, wrote to Prime Minister Weremensinghe and said that the LTTE had decided to suspend its participation in the peace negotiation:

The exclusion of the LTTE from a critical aid conference in Washington, the non- implementation of the terms and conditions enunciated in the truce document, the continuous suffering and hardship experienced by hundreds of thousands of internally displaced Tamils, the aggressive Sinhala military occupation of Tamil cities and civilian settlements, the distortion and marginalisation of the extreme conditions of poverty and deprivation of the Tamils of the northeast in the macro-economic policies and strategies of the government have seriously undermined the confidence of the Tamil people and the LTTE leadership in the negotiating process.<sup>467</sup>

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<sup>465</sup> Ibid, p. 44

<sup>466</sup> Ibid.

<sup>467</sup> Ibid.

However, in private, Balasingham affirmed that the LTTE had no intention of withdrawing from talks altogether.<sup>468</sup>

Still, this heightened an existing division undergirding the talks: the GoSL enjoyed a much closer relationship with the international community than the LTTE could. Indeed, Balasingham spoke of a “peace trap,” saying that the LTTE was on uneven ground because the international players in the peace process inherently favored state over non-state actors.<sup>469</sup> The Japan donor conference took place on June 9, 2003, and the LTTE did not attend.<sup>470</sup>

The GoSL continued to collaborate closely with Norway, other states, and international organizations in pursuing peace, while the LTTE became increasingly inaccessible, even to Norway, its previously preferred negotiating partner.<sup>471</sup> Throughout the fall of 2003, each side worked on parallel plans for the LTTE’s role in governing the north and east of Sri Lanka, but never met directly to discuss these plans.<sup>472</sup> Throughout this time, the LTTE continued to commit human rights violations against civilians, particularly those from non-Tamil ethnic minorities, in the north and east.<sup>473</sup> This met with no condemnation from the government or from Norway, who were eager to protect the peace process.<sup>474</sup> Meanwhile, only domestic advocates raised the issue of human

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<sup>468</sup> Sorbo et al., “Pawns of Peace,” p. 45.

<sup>469</sup> Goodhand, Jonathan, and Oliver Walton. “The limits of liberal peacebuilding? International engagement in the Sri Lankan peace process.” *Journal of Intervention and Statebuilding* 3, no. 3 (2009): 303-323, p. 309-310.

<sup>470</sup> Sorbo et al., “Pawns of Peace,” p. 46

<sup>471</sup> Ibid, p. 45

<sup>472</sup> Ibid.

<sup>473</sup> Ibid, p. 47

<sup>474</sup> Ibid.

rights accountability, with the UTHR releasing another statement criticizing the exclusion of human rights violations as an issue of contention in the peace process.<sup>475</sup>

On October 31, 2003, the LTTE proposed a plan for the governing of the north and east that stopped short of full Tamil Eelam secession, but stipulated that the absolute majority of the regional government must be held by the LTTE, and the LTTE must appoint all executives.<sup>476</sup> This sparked considerable fears among non-Tamil minorities living in the north and east. In response, President Karamunga declared a state of emergency, which effectively curtailed Prime Minister Weremesinghe's political power and severely limited his ability to participate in the peace process. Further, impending elections made the GoSL's future stance in peace negotiations unclear, and so in November 2003, Norway announced that it would suspend its direct involvement in the peace process until the Sri Lankan administration had more political consensus.<sup>477</sup> Norway continued to try to drum up international support for the peace process, but the international coalition that had emerged prior to the Japan conference had fragmented.

#### **4.2.3 Disintegration**

2004 brought many more major challenges to the peace process. In March 2004, a faction led by Colonel Karuna Amman split from the LTTE proper, taking thousands of LTTE troops and demanding status as a separate signatory of any peace agreement.<sup>478</sup> Further, following victory in the April 2004 elections, President Kumaratunga

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<sup>475</sup> Moolakkattu, John Stephen. "Peace facilitation by small states: Norway in Sri Lanka." *Cooperation and Conflict* 40, no. 4 (2005): 385-402, p. 395

<sup>476</sup> Sorbo et al., "Pawns of Peace," p. 47.

<sup>477</sup> Ibid.

<sup>478</sup> "Complicit in Crime: State Collusion in Abductions and Child Recruitment by the Karuna Group" *Human Rights Watch* January 23, 2007, <https://www.hrw.org/reports/2007/srilanka0107/> Accessed March 25, 2019, p. 1

consolidated her power and took a more hardline stance during peace negotiations.<sup>479</sup>

Finally, in December 2004, a tsunami decimated Sri Lanka, killing over 35,000 Sri Lankans and displacing over 550,000.<sup>480</sup>

The tsunami precipitated an influx of international aid and attention into Sri Lanka, which created new political openings in the stalled peace process. The GoSL and the LTTE agreed on a joint management structure to administer the regions affected by the tsunami, but it was scuttled by protests from the Muslim political party.<sup>481</sup> Additionally, the influx of international aid heightened the asymmetry between the GoSL as a state actor and the LTTE as a non-state actor.

The LTTE continued its strategy of targeted killings, which escalated on August 12, 2005, when a sniper killed the GoSL's Foreign Minister.<sup>482</sup> Some designate this event as the re-ignition of the conflict.<sup>483</sup> The domestic and international reactions were swift and severe. The GoSL put in place emergency measures that enhanced the armed forces' powers of search and detention, and that authorized preventative detention.<sup>484</sup> This did not provoke immediate international condemnation, although months later, human rights organizations would take issue with this measure. However, international censure of the LTTE was swift, and the EU quickly announced that it would no longer receive LTTE delegations.<sup>485</sup> Still, the LTTE continued their attacks on government targets, with an especially intense spree surrounding the elections in December 2005.<sup>486</sup>

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<sup>479</sup> Sorbo et al., "Pawns of Peace," p. 52

<sup>480</sup> Ibid.

<sup>481</sup> Ibid, p. 53.

<sup>482</sup> Human Rights Watch, "Complicit in Crime," p. 11

<sup>483</sup> Bajoria, "The Sri Lankan Conflict."

<sup>484</sup> "Improving Civilian Protection in Sri Lanka" *Human Rights Watch* September 2006 <https://www.hrw.org/legacy/backgrounder/asia/srilanka0906/> Accessed March 25, 2019, p. 42-43

<sup>485</sup> Sorbo et al., "Pawns of Peace," p. 55

<sup>486</sup> Sorbo et al., "Pawns of Peace," p. 56

Norway convinced both sides to come to formal negotiations in February of 2006.<sup>487</sup> Because the EU had imposed a travel ban on the LTTE, the talks were held in Geneva, which also allowed for a series of talks on human rights and humanitarian issues at the ICRC.<sup>488</sup> At this round of negotiations, the GoSL extracted a promise from the LTTE to stop conscripting child soldiers, and the GoSL pledged to stop sponsoring paramilitary groups.<sup>489</sup> Participants in the talks expressed skepticism that either pledge was requested and made in good faith, and instead observed that they seemed to be attempts to set each other up to not meet their commitments, and thus granting themselves a pretext to withdraw from negotiations.<sup>490</sup> According to the SLMM, neither promise was met.<sup>491</sup> The LTTE refused to come to another scheduled round of formal talks, citing GoSL noncompliance.<sup>492</sup> By the end of April 2006, full-scale hostilities had resumed.

Again, it is significant that both the GoSL and LTTE felt that they could exact and make commitments to adhere to international humanitarian law that even contemporary observers believed were not made in good faith. This suggests that neither side's leaders' perceived obeying international humanitarian law to significantly affect their post-conflict exit options.

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<sup>487</sup> Sorbo et al., "Pawns of Peace," p. 57

<sup>488</sup> Ibid.

<sup>489</sup> Ibid.

<sup>490</sup> Ibid, p. 56

<sup>491</sup> Sri Lanka Monitoring Mission, "The SLMM Report" *Norwegian Ministry of Foreign Affairs* October 2010 [http://www.ptsrilanka.org/wp-content/uploads/2017/04/slmm\\_final\\_report.pdf](http://www.ptsrilanka.org/wp-content/uploads/2017/04/slmm_final_report.pdf) Accessed March 25, 2019, p. 125

<sup>492</sup> Sorbo, "Pawns of Peace," p. 57



### 4.3 Battle resumes

#### 4.3.1 International condemnation

The resumption of full-scale hostilities was met with swift condemnation from the international community. Canada and the Council of the EU officially classified the LTTE as a terrorist organization,<sup>493</sup> and Japan refused to meet with the LTTE.<sup>494</sup> At the same time, India increased its military support of the GoSL.<sup>495</sup>

International and domestic civil society increased their criticism of the human rights situation in Sri Lanka. On June 22, UNICEF released a statement about abductions of children and called on the GoSL to act.<sup>496</sup> On the same day, the Center for Policy Alternatives called for an end to the violence and a return to peace negotiations.<sup>497</sup> Three days later, President Rajapaksa offered a two-week ceasefire, but the LTTE did not trust the offer and rejected it.<sup>498</sup>

Less than a week later, the GoSL launched a full-scale military offensive in northern Sri Lanka. Government forces executed 17 French humanitarian aid workers in their compound, and the GoSL forbade the SLMM from investigating the attack.<sup>499</sup> In the subsequent weeks, the GoSL severely limited humanitarian access to the conflict zone, and by the end of August, only the UNHCR and the ICRC were allowed to provide humanitarian aid.<sup>500</sup>

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<sup>493</sup> Goodhand and Walton. "The limits of liberal peacebuilding? International engagement in the Sri Lankan peace process." p. 313

<sup>494</sup> Sorbo et al., "Pawns of Peace," p. 58

<sup>495</sup> Ibid, p. 59

<sup>496</sup> "UNICEF condemns abduction and recruitment of Sri Lankan children by the Karuna group" *UNICEF June 22, 2006* [https://www.unicef.org/media/media\\_34677.html](https://www.unicef.org/media/media_34677.html) Accessed March 25, 2019

<sup>497</sup> Centre for Policy Alternatives, "Peace Support Group (PSG) Statements—2002 to 2006"

<sup>498</sup> Sorbo et al., "Pawns of Peace," p. 61

<sup>499</sup> Ibid.

<sup>500</sup> Human Rights Watch, "Improving Civilian Protection in Sri Lanka," p. 22

In the later months of 2006, significant international attention on the humanitarian situation in Sri Lanka began, and the issue of impunity for atrocities entered the international conversation. The member states of the Tokyo Donor Conference insisted that the GoSL provide humanitarian access and security guarantees for NGO and international organization staff.<sup>501</sup> Germany froze all aid to Sri Lanka due to the humanitarian situation.<sup>502</sup> HRW issued a report in September 2006 in which they wrote “Perhaps more than anything else, impunity for human rights violations has helped to perpetuate the cycle of violence and reprisal that continues to plague the country.”<sup>503</sup>

In response to international pressure, on September 4, 2006, the GoSL announced that it would invite an International Independent Commission “to inquire into abductions, enforced disappearances, and unlawful killings in all areas of the country.”<sup>504</sup> This commission was never convened; in its place, President Rajapaksa appointed a Presidential Commission of Inquiry staffed by three Sri Lankan Supreme Court judges and two other Sri Lankans, with international actors only acting as observers.<sup>505</sup> He also created a Presidential Commission on the Disappeared to examine disappearances that happened after September 13, 2006.<sup>506</sup>

This did little to deflect international attention from the humanitarian situation. In October 2006, the UN Secretary General released a report on recruitment of child soldiers

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<sup>501</sup> “Stop the War on Civilians in Sri Lanka: a briefing on the humanitarian crisis and lack of human rights protection” *Amnesty International* March 2009

<https://www.amnesty.org/download/Documents/48000/asa370042009en.pdf> Accessed March 25, 2019, p. 15

<sup>502</sup> Sorbo et al., “Pawns of Peace,” p. 62

<sup>503</sup> Human Rights Watch, “Improving Civilian Protection in Sri Lanka,” p. 51

<sup>504</sup> “Establishing a commission of inquiry into serious violations of human rights law and international humanitarian law in Sri Lanka: Amnesty International’s recommendations” *Amnesty International* September 2006 <https://www.amnesty.org/download/Documents/72000/asa370312006en.pdf> Accessed March 25, 2019

<sup>505</sup> Human Rights Watch, “Improving Civilian Protection in Sri Lanka,” p. 55

<sup>506</sup> Ibid.

in Sri Lanka.<sup>507</sup> In response, the LTTE's Tamil Eelam Justice Division announced a new Child Protection Act, which outlawed the conscription of 17 year olds and the participation of 18 year olds in armed conflict.<sup>508</sup> In November, the UN Special Representative for Children and Conflict publicized the same allegations of conscription of child soldiers, and in response, President Rajapaksa said he would order an investigation.<sup>509</sup> The UN Special Representative wrote to President Rajapaksa to follow up on the status of the investigation,<sup>510</sup> and but no investigation was opened. HRW wrote to both President Rajapaksa<sup>511</sup> and SP Tamilsevan<sup>512</sup>, the head of the LTTE's political wing, asking them investigate the conscription of child soldiers. President Rajapaksa delegated a response to the Minister of Disaster Management and Human Rights Management<sup>513</sup>; SP Tamilsevan responded a week later.<sup>514</sup> In December 2006, the GoSL army began investigating child abductions.<sup>515</sup>

In November 2006, 20,000 civilians fled northern and eastern Sri Lanka<sup>516</sup> amid reports that GoSL forces either failed to distinguish between combatants and civilians or even purposefully targeted civilians.<sup>517</sup> The LTTE was cited by the SLMM for failing to allow civilians to leave the combat zone and deliberately restricting their movements.<sup>518</sup>

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<sup>507</sup> United Nations Security Council "Report of the Secretary-General on Children and armed conflict in Sri Lanka" December 20, 2006 <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S2006%201006.pdf> Accessed March 25, 2019

<sup>508</sup> "Tamil Eelam Child Protection Act" *Tamil Nation* October 25, 2006.

[http://tamilnation.co/tamileelam/defacto/061025child\\_act.htm](http://tamilnation.co/tamileelam/defacto/061025child_act.htm) Accessed March 25, 2019.

<sup>509</sup> [https://www.unicef.org/srilanka/media\\_2514.htm](https://www.unicef.org/srilanka/media_2514.htm)

<sup>510</sup> Human Rights Watch, "Complicit in Crime," p. 35

<sup>511</sup> Ibid, p. 68-70

<sup>512</sup> Ibid, p. 10

<sup>513</sup> Ibid, p. 28

<sup>514</sup> Ibid, p. 10

<sup>515</sup> Ibid, p. 28

<sup>516</sup> Ibid, p. 18

<sup>517</sup> "Return to War: Human Rights Under Siege" *Human Rights Watch* August 5, 2007, <https://www.hrw.org/reports/2007/srilanka0807/> Accessed March 25, 2019, p. 5

<sup>518</sup> Ibid, p. 19

The GoSL was acutely aware of the need to respond to humanitarian critiques. In the middle of December, a letter from the Foreign Minister to the President leaked.<sup>519</sup> The letter warned that the GoSL must do more to protect human rights, saying:

Whether or not [abuses] were committed by terrorist groups or government agencies, it is the responsibility of the government to investigate and prosecute the perpetrators in keeping with Sri Lanka's treaty commitments... Even when fighting a ruthless terrorist group like the LTTE, the government must not be seen as using the same tactics as a terror group. The rule of law must always be respected by all arms of the government.<sup>520</sup>

The fact that these concerns were raised within the government showed that leaders understood that international concerns about human rights abuses could be a threat, but the fact that these concerns were met with measures that were widely characterized as smokescreening shows that the GoSL did not perceive this potential threat to be serious enough to warrant real concessions. Instead, the GoSL deflected international criticism not by setting up robust investigatory and accountability mechanisms, but instead by contextualizing its war against the LTTE as part of the global war on terror, and by arguing that a domestic solution to the conflict would be more effective than any international intervention that would violate sovereignty.<sup>521</sup>

The following year saw the GoSL continuing to go on the offensive, both in terms of its military strategy and its approach to human rights concerns. In April 2007, the Secretary of Defense called the editor of the Daily Mirror and warned that he would “exterminate” a journalist who wrote on human rights issues in eastern Sri Lanka.<sup>522</sup> In May, the GoSL announced that it was holding 452 people under emergency detention

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<sup>519</sup> Ibid, p. 4

<sup>520</sup> Ibid, p. 4

<sup>521</sup> Sorbo et al., “Pawns of Peace,” p. 62

<sup>522</sup> Human Rights Watch, “Return to War,” p. 11

regulations; 372 of them were Tamil.<sup>523</sup> They did not reply to a HRW request for more information on these detainees.<sup>524</sup>

International pressure on the human rights situation continued. On August 5, HRW published a report arguing forcefully that the GoSL's Presidential Commission of Inquiry was an insufficient accountability and investigative body.<sup>525</sup> Perhaps more important, the HRW report called for the establishment of "a human rights monitoring mission under United Nations auspices to investigate abuses by all parties, report publicly on abuses to enable prosecutions, and facilitate efforts to improve human rights at the local level."<sup>526</sup> Two months later, the US echoed this call for a UN human rights monitoring mission.<sup>527</sup>

Shortly after this US move, the GoSL invited and hosted the UN High Commissioner for Human Rights.<sup>528</sup> Two months later, in December 2007, the UN Secretary General's Senior Representative on Internal Displacement visited Sri Lanka to observe human rights conditions and report back to the UN.<sup>529</sup> These actions showed that the GoSL was compelled to respond to international human rights critiques, but these fairly superficial responses still indicate that the GoSL did not calculate that it would need to make serious concessions to address the international community's concerns

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<sup>523</sup> Ibid, p. 8

<sup>524</sup> Ibid, p. 14

<sup>525</sup> Ibid, p. 12

<sup>526</sup> Ibid, p. 13-14

<sup>527</sup> Goodhand and Walton. "The limits of liberal peacebuilding? International engagement in the Sri Lankan peace process." p. 313

<sup>527</sup> Human Rights Watch, "Return to War," p. 13-14

<sup>528</sup> Goodhand and Walton. "The limits of liberal peacebuilding? International engagement in the Sri Lankan peace process." p. 313

<sup>528</sup> Ibid.

<sup>529</sup> Amnesty International "Stop the War on Civilians in Sri Lanka" p. 11

about human rights. This could very well be due to the fact that GoSL leaders did not perceive their exit options to be threatened.

#### **4.3.2 Ceasefire collapses**

On January 2, 2008, the GoSL officially withdrew from the CFA.<sup>530</sup> Therefore, the SLMM withdrew its monitors, and two weeks later, the monitoring mission officially disbanded.<sup>531</sup> The conflict, accordingly, intensified. There is no evidence that the international community's attention to human rights issues, and civil society's protests of impunity for abuses, affected the dissolution of the CFA. While both the GoSL and the LTTE made gestures in response to human rights critiques, there is no evidence that these critiques, or the prospect of increased attention on human rights issues, affected their strategy towards the conflict or the peace in any way. Further, the persistent critiques of impunity at this time, as well as the critiques of the GoSL's investigatory mechanisms, suggest that the prospect of future accountability was not a factor in the GoSL or the LTTE's decision making. There was no reason to fear prosecution; indeed, both sides' leaders' actions suggested that they only feared the punishments that would come with defeat.

Each side's approach to the remainder of the conflict suggests that culpability for human rights violations was not a primary concern, even in spite of sustained international attention to the human rights situation. In March of 2008, the GoSL established a new internment policy for IDPs<sup>532</sup>. In response to reports of limited freedom

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<sup>530</sup> Permanent People's Tribunal. "Tribunal on Sri Lanka Final Report" January 16, 2010 [https://www.tamilnet.com/img/publish/2010/01/Dublin\\_Permanent\\_Peoples\\_Tribunal\\_Final\\_Report.pdf](https://www.tamilnet.com/img/publish/2010/01/Dublin_Permanent_Peoples_Tribunal_Final_Report.pdf), Accessed March 25, 2019, p. 11

<sup>531</sup> The SLMM Report

<sup>532</sup> "Besieged, Displaced, and Detained: The Plight of Civilians in Sri Lanka's Vanni Region," *Human Rights Watch* December 23, 2008, <https://www.hrw.org/sites/default/files/reports/srilanka1208webwcover.pdf> Accessed March 25, 2019 p. 9

of movement<sup>533</sup>, the UN Secretary General’s Representative on Internally Displaced Persons reminded Sri Lanka at the UN Human Rights Council that IDPs

as citizens of their country {remained] entitled to all guarantees of international human rights and international humanitarian law subscribed by the state...while the need to address security may be a component of the plan, it should be humanitarian and civilian in nature. In particular, IDPs’ freedom of movement must be respected, and IDPs may not be confined to a camp.<sup>534</sup>

The GoSL did not change the IDP policy. At the end of August, the UN High Commissioner for Refugees (UNHCR) sent a public memorandum to the GoSL reminding them of the rights of refugees and IDPs, and stating that UNHCR support of Sri Lanka was contingent on its government’s respect for these rights.<sup>535</sup>

A banner signal that the GoSL was willing to ignore the international community’s concerns about human rights was its expulsion of aid workers for the conflict zones in September 2008.<sup>536</sup> The UN agreed to this withdrawal.<sup>537</sup> President Rajapaksa affirmed that the GoSL ordered the humanitarian withdrawal to pave the way for a GoSL military victory, saying to journalists that the order was short term because the GoSL army would soon “crush” the LTTE.<sup>538</sup>

The LTTE also showed a similar disregard for human rights—and future human rights accountability—when it announced a new policy that civilians avoiding service in the LTTE would have ten of their family members arrested and sentenced to forced labor.<sup>539</sup> Following the passage of this policy, the LTTE substantially increased its

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<sup>533</sup> Ibid, p. 11

<sup>534</sup> Ibid, p. 12

<sup>535</sup> Ibid, p. 12-13

<sup>536</sup> Amnesty International, “Stop the War on Civilians in Sri Lanka,” p. 4

<sup>537</sup> Human Rights Watch, “Besieged, Displaced, and Detained,” p. 15

<sup>538</sup> Human Rights Watch, “Besieged, Displaced, and Detained,” p. 31

<sup>539</sup> Richards, Joanne. “An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)” *Centre on Conflict, Development, and Peacebuilding* October

conscription of child soldiers.<sup>540</sup> In December of 2008, HRW released a report documenting the LTTE's extensive abuses of civilians, especially the effects of its new conscription policy.<sup>541</sup>

International observation and condemnation of the human rights situation continued into 2009. On January 21, 2009, the GoSL unilaterally created a no fire zone in LTTE territory, and asked civilians to move into this zone to ensure their safety, in an attempt to constrict the LTTE to a smaller operating area.<sup>542</sup> In response to an outcry about this, the GoSL's military spokesman claimed that there were no civilian casualties, saying "We are not targeting any civilians, so there can't be any civilians killed."<sup>543</sup> This explanation did not satisfy the international community, and the EU Commissioner for Development and Humanitarian Aid condemned the situation on January 29.<sup>544</sup>

#### **4.3.3. Attempt at limited ceasefire**

Perhaps in response, the GoSL declared a limited ceasefire from February 1-3, explicitly to allow civilians to leave the conflict zone and into government territory.<sup>545</sup> The LTTE did not observe the ceasefire, and instead attacked fleeing civilians in an attempt to keep them in LTTE territory.<sup>546</sup> LTTE leaders thought that the GoSL would continue to advance in spite of the certainty of civilian casualties, and that these civilian

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2014 <https://repository.graduateinstitute.ch/record/292651/files/CCDP-Working-Paper-10-LTTE-1.pdf>, Accessed March 25, 2019 p. 35

<sup>540</sup> Ibid, p. 34.

<sup>541</sup> Human Rights Watch, ""Besieged, Displaced, and Detained," p. 4

<sup>542</sup> Richards, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)" p. 64

<sup>543</sup> "War on the Displaced: Sri Lankan Army and LTTE Abuses against Civilians in the Vanni" *Human Rights Watch* February 19, 2009 [https://www.hrw.org/sites/default/files/reports/srilanka0209web\\_0.pdf](https://www.hrw.org/sites/default/files/reports/srilanka0209web_0.pdf) Accessed March 25, 2019, p.22

<sup>544</sup> European Parliament "Louis Michel condemns the escalating humanitarian catastrophe in Sri Lanka and calls for life to be respected" January 29, 2009 [http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/fd/droi\\_090330\\_sl9/droi\\_090330\\_sl9en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/droi_090330_sl9/droi_090330_sl9en.pdf) Accessed March 25, 2019

<sup>545</sup> Richards, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)" p. 64

<sup>546</sup> Ibid.



casualties would lead the international community to push harder for a longer ceasefire, which the LTTE could use to recoup its forces.<sup>547</sup>

The humanitarian situation continued to deteriorate. On February 12, the GoSL violated its no fire zone and then declared a smaller no fire zone, asked civilians to move there, and then went on the offensive to push the LTTE front lines into the new no fire zone, suggesting that they too wanted to set their opponent up for civilian casualties.<sup>548</sup> This same week, UNICEF released a statement criticizing the LTTE's conscription of children.<sup>549</sup>

On February 24, the LTTE wrote to the EU, US, Japan, and Norway, asking for help brokering a ceasefire.<sup>550</sup> In spite of the constant and strong international scrutiny of the human rights situation, and of each side's violation of human rights and international humanitarian law, the GoSL rejected the request for a ceasefire, even with the international community and major donor states watching. Observers agreed that the GoSL thought that they would soon win the conflict, and a ceasefire would decrease their odds of victory because it would allow the LTTE time to recoup their forces.<sup>551</sup>

The GoSL's rejection of this ceasefire offer is significant in terms of how the prospect of accountability affects leaders' decisions to come to the negotiating table. The decision to reject the offer of a ceasefire was not made with the prospect of any criminal accountability for human rights violations in mind. Since Sri Lanka was not a signatory of the Rome Statute, if the GoSL won the conflict and leaders retained incumbency, the only way they would face prosecution for their failure to prevent civilian deaths would be

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<sup>547</sup> Ibid.

<sup>548</sup> Ibid, p. 65.

<sup>549</sup> Human Rights Watch, "War on the Displaced" p. 11

<sup>550</sup> Richards, "An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)" p. 65

<sup>551</sup> Ibid, p. 65

if the UN Security Council referred the case to the ICC. India and in some cases China had repeatedly showed their willingness to shield the GoSL from human rights consequences in the international community<sup>552</sup>, which made the prospect of GoSL leaders facing international prosecution even more unlikely. Further, while human rights advocates mobilized against impunity, at this phase in the conflict they were not explicitly advocating for international criminal accountability. Therefore, the extremely low likelihood of prosecutorial accountability undergirded the GoSL's decision to keep fighting, even with the certain prospect of continued civilian casualties.

#### **4.4 Decisive victory**

As the GoSL and the LTTE kept fighting, the international community continued to raise the alarm about the human rights situation. Remarkably, in a March 2008 visit to the US, India's Foreign Minister raised the issue of civilian protection in Sri Lanka.<sup>553</sup> The same month, Japan raised serious concerns about civilian casualties and the treatment of internally displaced people at a meeting of the Human Rights Council.<sup>554</sup> At the same time, the UN Office of the High Commissioner for Human Rights released a statement saying that serious violations of international law were taking place in the Sri Lankan conflict.<sup>555</sup> Finally, the UN Secretary General released a strong statement on the human rights situation.<sup>556</sup>

At the same time, the GoSL's offensive reached the heart of LTTE territory, the GoSL army started successfully killing many of the LTTE's highest commanders. Still,

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<sup>552</sup> Sorbo et al., "Pawns of Peace."

<sup>553</sup> Amnesty International, "Stop the War on Civilians in Sri Lanka," p. 14

<sup>554</sup> Ibid.

<sup>555</sup> UN Office of the High Commissioner of Human Rights. "Serious violations of international law committed in Sri Lanka conflict" March 13, 2009

[http://sangam.org/2009/03/OHCHR\\_Violations.php?uid=3350](http://sangam.org/2009/03/OHCHR_Violations.php?uid=3350) Accessed March 25, 2019

<sup>556</sup> Amnesty International, "Stop the War on Civilians in Sri Lanka," p. 15

the LTTE continued recruiting child soldiers through April 2008,<sup>557</sup> while also attempting an exit. Severely weakened, on April 26, the LTTE declared a unilateral ceasefire and asked the GoSL to also call a ceasefire.<sup>558</sup> The GoSL called this a “joke.”<sup>559</sup>

On May 18, 2009, the LTTE surrendered to the GoSL, eliminating the need for any peace negotiation.<sup>560</sup> Prior to the surrender, the LTTE contacted the UN, the ICRC, Norway’s chief negotiator from 2002, President Rajapaksa, and other members of the GoSL cabinet.<sup>561</sup> The GoSL promised security during the surrender, but refused to allow an international monitor to be present.<sup>562</sup> Several LTTE commanders died during the surrender.<sup>563</sup> On May 19, the GoSL declared victory.<sup>564</sup>

Immediately after the declaration of victory, UN Secretary General Ban Ki Moon visited northern Sri Lanka.<sup>565</sup> Three days later, Secretary General Moon and President Rajapaksa issued a joint statement.<sup>566</sup> The Secretary General said that an accountability process for addressing violations of international humanitarian and human rights law was crucial for Sri Lanka to move forward.<sup>567</sup> Soon after, the Secretary General convened a panel of experts to investigate the final days of the conflict and make recommendations concerning accountability.<sup>568</sup> However, the Secretary General did not explicitly call for

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<sup>557</sup> Richards, “An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)” p. 35

<sup>558</sup> Ibid, p. 67

<sup>559</sup> Ibid.

<sup>560</sup> Ibid.

<sup>561</sup> Ibid, p. 68

<sup>562</sup> Ibid.

<sup>563</sup> Ibid.

<sup>564</sup> “Sri Lanka Says Leader of Rebels Has Died” *New York Times* May 18, 2009

[https://www.nytimes.com/2009/05/19/world/asia/19lanka.html?\\_r=1&ref=global-home](https://www.nytimes.com/2009/05/19/world/asia/19lanka.html?_r=1&ref=global-home) Accessed March 25, 2019.

<sup>565</sup> “When Will They Get Justice? Failures of Sri Lanka’s Lessons Learnt and Reconciliation Commission” *Amnesty International* September 2011

<https://www.amnesty.org/download/Documents/28000/asa370082011en.pdf> Accessed March 25, 2019, p. 7

<sup>566</sup> Ibid, p. 7-8

<sup>567</sup> Ibid.

<sup>568</sup> Ibid.

international prosecution, or for prosecution of leaders. President Rajapaksa said that Sri Lanka was committed to protecting human rights in keeping with “international human rights standards and Sri Lanka’s international obligations.”<sup>569</sup> The fact that these obligations did not include the Rome Statute meant that international prosecution of leaders would not be a concern for how the GoSL architected the peace.

### **5.0 The attempts at accountability**

This dissertation argues that the role of the ICC is singular in peace processes not because it is an accountability mechanism, but because it is an international prosecutorial accountability mechanism. It is both the fact that its scope is international and the fact that it has a prosecutorial accountability mechanism that allows the ICC to play the role it does. The case of Sri Lanka demonstrates this because although the ICC was not involved at any level, there were numerous accountability mechanisms employed throughout the conflict, and after the conflict. However, since none of these accountability mechanisms were both international in scope and prosecutorial in design, none of them affected the peace process in the ways that the ICC can affect peace processes. In particular, since none of them could seriously threaten leaders’ exit options, they could not have the same effect as the ICC. In this section, I detail these accountability mechanisms, and argue that none of them substantially affected the Sri Lankan peace process because they were not designed to constrain actors, but only to satisfy various stakeholders, and because, although advocates had been railing against impunity since the 2002 peace process, powerful stakeholders only began advocating for international prosecution years after the conflict had ended.

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<sup>569</sup> Ibid.

### 5.1 Presidential Commission of Inquiry

The earliest investigatory and justice mechanism, as well as the only one created during the conflict, was the President's Commission of Inquiry (COI) created in September 2006. President Rajapaksa formed the COI largely in response to increased international scrutiny of the human rights situation in Sri Lanka. However, it is worth noting that the Sri Lankan legislation that gives presidents the mandate to appoint such commissions stipulates that these commissions should not be appointed to investigate grave human rights violations.<sup>570</sup>

President Rajapaksa first announced that he would appoint an international COI, which independent, international members who would be tasked with investigating “abductions, enforced disappearances, and unlawful killings in all areas of the country.”<sup>571</sup> However, the COI appointed was not international or independent, and did not accomplish this mandate. The COI appointed consisted of three Sri Lankan Supreme Court Judges, two other Sri Lankans, and international observers who were not officially members of the COI.<sup>572</sup> AI asserts that President Rajapaksa appointed these international observers to fend off international pressure to have an OHCHR monitoring presence in Sri Lanka.<sup>573</sup>

The COI was designed to investigate a pre-specified list of human rights violations associated with the conflict, and was not given the mandate to investigate ongoing human rights violations.<sup>574</sup> The fact that the COI did not have the mandate to

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<sup>570</sup> “Twenty Five Years of Make Believe: Sri Lanka’s Commissions of Inquiry” *Amnesty International* 2009 [http://www.observatori.org/paises/pais\\_75/documentos/srilanka.pdf](http://www.observatori.org/paises/pais_75/documentos/srilanka.pdf), Accessed March 25, 2019, p. 9

<sup>571</sup> Amnesty International, “Establishing a Commission of Inquiry”

<sup>572</sup> Human Rights Watch, “Improving Civilian Protection in Sri Lanka,” p. 55

<sup>573</sup> Amnesty International, “Twenty Five Years of Make Believe”, p. 43

<sup>574</sup> *Ibid*, p. 14

investigate ongoing violations meant that neither the GoSL or the LTTE needed to take the COI's gaze into account when planning their future steps, either as they pertained to fighting war or making peace.

The COI did not successfully execute even this limited mandate. Of the sixteen cases it was tasked to hear, it investigated four by January 2009.<sup>575</sup> Issues with the COI prompted an outcry from both domestic and international human rights advocates. In November 2008, Sri Lankan human rights organizations withdrew their participation from the COI.<sup>576</sup> AI released critical reports<sup>577</sup>, and HRW called it a “smokescreen.”<sup>578</sup> President Rajapaksa dissolved the commission in June 2009, when it had completed seven of its sixteen mandated cases.<sup>579</sup> The fact that the COI was appointed by the President of Sri Lanka, and was run entirely by the governing administration that also oversaw the conflict, is indication enough that it could not constrain leaders' exit options, and therefore, I argue, did not substantially affect their decisions about conflict and peace.

## 5.2 Permanent People's Tribunal on Sri Lanka

The Permanent People's Tribunal (PPT) characterized itself as “an international opinion tribunal, independent of any State authority.”<sup>580</sup> This independence meant it had no prosecutorial power, and the fact that it was an “opinion tribunal” meant that it could not affect leaders' exit options. Importantly, Tamil expatriates and civil society advocates

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<sup>575</sup> Ibid, p. 15

<sup>576</sup> Ibid, p. 41

<sup>577</sup> Ibid.

<sup>578</sup> “Sri Lanka: Domestic Inquiry into Abuses a Smokescreen: UN Secretary General Should Establish International Investigation” *Human Rights Watch* October 27, 2009 <https://www.hrw.org/news/2009/10/27/sri-lanka-domestic-inquiry-abuses-smokescreen> Accessed March 25, 2019.

<sup>579</sup> Ibid.

<sup>580</sup> Permanent People's Tribunal, “Final Report,” p. 7

convened the PPT almost immediately following the end of hostilities. Planning for the PPT started in July 2009, and it was held in January 2010.<sup>581</sup> The mandate of the PPT was to collect and evaluate testimony on allegations of human rights violations committed by the GoSL.<sup>582</sup> The PPT contextualized its findings in terms of the Rome Statute, and alleged that the GoSL violated several aspects of the Rome Statute.<sup>583</sup> The PPT called on the GoSL to establish a Truth and Justice Commission that would ensure that those culpable for war crimes would be prosecuted,<sup>584</sup> and to sign and ratify the Rome Statute.<sup>585</sup> Due to its affiliation with the Tamil diaspora, and the fact that it unilaterally condemned the GoSL and glossed over LTTE crimes, external stakeholders did not take it seriously,<sup>586</sup> another reason that it could not constrain leaders' exit options and thus did not impact the peace.

### **5.3 Lessons Learnt and Reconciliation Commission**

In response to the UN Secretary General's insistence that violations of international human rights and humanitarian law be investigated, and impunity be prevented, President Rajapaksa established a Lessons Learnt and Reconciliation Commission (LLRC) in May 2010.<sup>587</sup> The LLRC began to hold hearings on August 11, 2010.<sup>588</sup> At the opening, the chair of the LLRC defined its mandate not as preventing impunity or ensuring accountability, but as identifying the causes of the failure of the 2002 CFA and formulating proposals to ensure "national unity and reconciliation

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<sup>581</sup> Ibid, p. 7

<sup>582</sup> Ibid, p. 10

<sup>583</sup> Ibid, p. 16-18

<sup>584</sup> Ibid, p. 20

<sup>585</sup> Ibid, p. 21

<sup>586</sup> Höglund, Kristine, and Camilla Orjuela. "Winning the peace: conflict prevention after a victor's peace in Sri Lanka." *Contemporary Social Science* 6, no. 1 (2011): 19-37, p. 30

<sup>587</sup> Amnesty International "When Will They Get Justice?" p. 9

<sup>588</sup> Ibid, p. 10

amongst all communities in Sri Lanka.”<sup>589</sup> As with the Presidential COI, the fact that the LLRC was called by the incumbent President of Sri Lanka and staffed by the same administration that oversaw the final days of the civil war shows that it was not situated to affect leaders’ exit options. Indeed, it is much more likely that it was created to prevent government leaders’ exit options from being affected by calls for post-conflict accountability.

From almost its inception, the LLRC faced scrutiny from international human rights advocates. In September 2010, the LLRC released an interim report that discussed neither specific human rights violations nor accountability.<sup>590</sup> Following this, AI, HRW, and the ICG declined an invitation to testify before the LLRC because of its inadequacy to address human rights issues.<sup>591</sup> Further, the Center for Policy Alternatives, while welcoming the LLRC’s interim recommendations, issued a report criticizing its failure to protect witnesses and victims from harassments and to garner sufficient sourcing and corroboration of witness accounts.<sup>592</sup> Nonetheless, the GoSL created a committee to implement the LLRC’s interim recommendations.<sup>593</sup>

In response to international pressure about how the LLRC would pursue accountability, Sri Lanka’s Attorney General told a UN panel that any human rights violators identified by the LLRC would be referred to the Attorney General’s office.<sup>594</sup> The Attorney General said that this had not yet happened because the LLRC had failed, after a more than twenty-seven year civil war, to identify any perpetrators who merited

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<sup>589</sup> Ibid, p. 13

<sup>590</sup> Ibid, p. 19

<sup>591</sup> Ibid, p. 6

<sup>592</sup> “Release of the Lessons Learnt and Reconciliation Commission (LLRC Report” *Centre for Policy Alternatives* January 4, 2011 <http://www.cpalanka.org/wp-content/uploads/2012/01/Release-of-the-Lessons-Learnt-and-Reconciliation-Commission.pdf> Accessed March 25, 2019.

<sup>593</sup> Amnesty International “When Will They Get Justice?” p. 54

<sup>594</sup> Ibid, p. 16



further investigation.<sup>595</sup> The international community continued to criticize the LLRC. Most damningly, the April 2011 report issued by the UN Secretary General's Panel of Experts (see Section 5.4) said that "the LLRC is deeply flawed, does not meet international standards for an effective accountability mechanism and, therefore, does not and cannot satisfy the joint commitment of the President of Sri Lanka and the Secretary-General to an accountability process."<sup>596</sup>

The LLRC released its final report in November 2011.<sup>597</sup> The report concluded that the GoSL never targeted civilians intentionally but had nonetheless been responsible for civilian casualties. On the other hand, it argued that the LTTE had repeatedly and deliberately broken international humanitarian law. The report recommended that many further investigations be carried out, with the possibility that cases could be referred to the Attorney General.

The international community was nearly unanimous in its assessment that the LLRC, its reports, and the implementation of its recommendations, were at best insufficient and at worst a smokescreen to help leaders avoid accountability. In response to these critiques, the LLRC became a main topic of the HRC's March 2012 Meeting.<sup>598</sup> The HRC resolved to urge the GoSL to conduct further probes into the most serious human rights violations.<sup>599</sup>

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<sup>595</sup> Ibid.

<sup>596</sup> "Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka" *United Nations Secretary General* March 31, 2011 [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf), Accessed March 25, 2019, p. v

<sup>597</sup> "Report of the Commission of Inquiry on Lessons Learnt and Reconciliation" November 2011 <http://slembassyusa.org/downloads/LLRC-REPORT.pdf> Accessed March 25, 2019

<sup>598</sup> Office of the United Nations High Commissioner for Human Rights "Human Rights Council adopts seven texts on Sri Lanka, Adequate Housing, Right to Food, and extends the mandate on Cultural Rights" March 22, 2012.

<sup>599</sup> "UN Human Rights Body to vote on resolution calling for Sri Lanka War Crimes Probes" *Washington Post* March 22, 2012.

#### 5.4 UN Panel of Experts

On June 22, 2010, the UN Secretary General announced that he had appointed a panel of experts to investigate the credibility allegations of violations of international human rights and humanitarian law during the civil war,<sup>600</sup> focusing on September 2008 to May 2009.<sup>601</sup> The panel gathered information from public documents, confidential written submissions from governments and international organizations, written submissions from the public, and meetings with individuals and organizations “directly involved in the final stages of the war.”<sup>602</sup> The GoSL did not allow the panel to visit Sri Lanka while it did its work, and so the panel could not directly interview many GoSL actors.<sup>603</sup> This is significant, as it shows that the GoSL considered the panel to be a threat to be neutralized.

The reason that a panel of experts could be this much of a threat is the fact that it was mounted by perhaps the highest-profile international institution in the world, which could amplify the political implications of its findings. However, it is crucial to note that the Panel of Experts was not endowed with any prosecutorial capacity, and they could only investigate and make recommendations.

In April 2011, the Panel issued a report on which allegations of human rights violations it found to be credible. It painted a very different picture than the reports issued by the Sri Lankan COI and LLRC mechanisms. Instead, the Panel said that it found credible evidence of “a wide range of serious violations of international humanitarian law and international human rights law was committed both by the GoSL and the LTTE,

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<sup>600</sup> Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka,” p. 1

<sup>601</sup> Ibid, p. 4

<sup>602</sup> Ibid, p. 5

<sup>603</sup> Ibid, p. 6

some of which would amount to war crimes and crimes against humanity.”<sup>604</sup> Further, it said that the way the war was fought by both sides “represented a grave assault on the entire regime of international law designed to protect individual dignity during both war and peace.”<sup>605</sup>

The Panel recommended that the GoSL “immediately convene genuine investigations” into grave human rights violations that occurred during the conflict,<sup>606</sup> issue an apology for civilian casualties incurred during the end of the war,<sup>607</sup> and create a reparations program for victims of the conflict.<sup>608</sup> They also recommended that the UN Secretary General establish an independent international mechanism to monitor the GoSL’s domestic accountability process, conduct independent investigations into human rights violations, and continue to collect information relevant to accountability.<sup>609</sup>

Immediately after the report was issued, the GoSL released a statement rejecting its findings, while also admitting that they had not read it closely.<sup>610</sup> On April 25, Secretary General Ban Ki Moon released the report to the public, but said that he did not have the power to convene the suggested international accountability mechanism.<sup>611</sup> The GoSL later released a more elaborate critique of the report.<sup>612</sup> However, in spite of its initial critiques, the report did not significantly change the GoSL’s behavior, or its approach to post-conflict accountability, even though it presented damning conclusions. This conforms with my dissertation’s theory, because even though the UN Secretary

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<sup>604</sup> Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka,” p. ii

<sup>605</sup> Ibid, p. ii

<sup>606</sup> Ibid, p. vii

<sup>607</sup> Ibid, p. viii

<sup>608</sup> Ibid, p. viii

<sup>609</sup> Ibid, p. vii

<sup>610</sup> Amnesty International “When Will They Get Justice?” p. 54

<sup>611</sup> Ibid.

<sup>612</sup> [http://www.mea.gov.lk/index.php?option=com\\_content&task=view&id=2746&Itemid=75](http://www.mea.gov.lk/index.php?option=com_content&task=view&id=2746&Itemid=75)

General is arguably the most influential human rights advocate in the world, and any body he convenes is automatically endowed with a considerable megaphone, the Panel of Experts had no prosecutorial capacity. Therefore, in spite of its clout, this Panel did not stand to directly affect leaders' exit options, and so it would be enough for the Sri Lankan government to condemn its findings and move on without having to adjust their policies.

On the other hand, the Tamil National Alliance welcomed the report, praised its findings, and urged the GoSL to act on its recommendations.<sup>613</sup> The international community also welcomed the report, with the United States,<sup>614</sup> the European Union,<sup>615</sup> and the UK<sup>616</sup> all releasing statements welcoming the report and saying that the its allegations should be more fully investigated. International human rights organizations also welcomed the report, and tried to use it to push for increased accountability in Sri Lanka. The OHCHR urged the GoSL to respond to it more seriously, saying that unless the GoSL reversed its trend of impunity, there would need to be “a full-fledged international inquiry.”<sup>617</sup> AI called for the UN to create this more fully-fledged

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<sup>613</sup> Tamil National Alliance. “TNA Response to the UN Expert Panel’s Report on Sri Lanka.” April 18, 2011. Accessed May 30, 2019. [https://www.sangam.org/2011/05/TNA\\_Response.php?uid=4348](https://www.sangam.org/2011/05/TNA_Response.php?uid=4348)

<sup>614</sup> US Mission to the United Nations. “Statement by Ambassador Susan E. Rice, US Permanent Representative to the United Nations, on the Release of the UN Panel of Experts’ Report on Sri Lanka. April 25, 2011. Accessed on May 30, 2019.

<https://web.archive.org/web/20110706005734/http://usun.state.gov/briefing/statements/2011/161769.htm>

<sup>615</sup> European Union. “EU Declaration by HR Ashton on the UN Report on Accountability in Sri Lanka.” May 20, 2011. Accessed May 30, 2019. [https://web.archive.org/web/20110516045544/http://www.europa-eu-un.org/articles/en/article\\_11019\\_en.htm](https://web.archive.org/web/20110516045544/http://www.europa-eu-un.org/articles/en/article_11019_en.htm)

<sup>616</sup> UK Foreign and Commonwealth Office. “Foreign Office welcomes UN Panel of Experts report on Sri Lanka.” April 27, 2011. Accessed on May 30, 2019. <https://www.gov.uk/government/news/foreign-office-welcomes-un-panel-of-experts-report-on-sri-lanka>

<sup>617</sup> United Nations Human Rights Office of the High Commissioner. Accessed May 30, 2019. <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10962&LangID=E>

international investigation, and to ensure accountability for perpetrators.<sup>618</sup> HRW echoed the call for an inquiry.<sup>619</sup>

### 5.5 OHCHR Investigation

In March of 2014, the HRC formally requested that the OHCHR

undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission (LLRC) and to establish the acts and circumstances of such alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability, with assistance from relevant experts and special procedures mandate holders.<sup>620</sup>

The final report of the OHCHR's investigation stated that it had been given this mandate because of widespread concerns about the LLRC's inadequacy and "lack of credibility."<sup>621</sup> Although the OHCHR was only tasked with investigation, the HRC stipulated that the investigation be conducted with the goal of avoiding impunity and ensuring accountability.<sup>622</sup> The report also stressed that its mandate was to conduct a human rights investigation of systematic and widespread abuses, but it was not to conduct a criminal investigation.<sup>623</sup> Nonetheless, the report repeatedly criticized the "impunity that is deeply embedded in Sri Lanka to this day."<sup>624</sup>

Like the Secretary General's panel of experts, the OHCHR was refused access to

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<sup>618</sup> Amnesty International. "UN must act now on Sri Lanka war crimes report." April 26, 2011. Accessed on May 30, 2019. <https://www.amnesty.org/en/latest/news/2011/04/un-must-act-now-investigate-war-crimes-sri-lanka/>

<sup>619</sup> Human Rights Watch. "Sri Lanka: UN Chief Should Establish International Inquiry." April 25, 2011. Accessed on May 30, 2019. <https://www.hrw.org/news/2011/04/25/sri-lanka-un-chief-should-establish-international-inquiry>

<sup>620</sup> UN Office of the High Commission for Human Rights. "Report of the OHCHR Investigation on Sri Lanka (OSIL)" September 16, 2015 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/132/86/PDF/G1413286.pdf?OpenElement>, Accessed March 25, 2019 p. 5

<sup>621</sup> Ibid, p. 5

<sup>622</sup> Ibid.

<sup>623</sup> "Report of the OHCHR Investigation on Sri Lanka," p. 5

<sup>624</sup> Ibid, p. 6

Sri Lanka during their investigation.<sup>625</sup> The report also states that the GoSL engaged in “a campaign of intimidation, harassment, surveillance, detention and other violations against human rights defenders and others, which was clearly intended– directly or indirectly - at deterring engagement with OISL.”<sup>626</sup> The LTTE was more cooperative with the investigation, but in interviews, still sought to obscure “any practices or policies by the organization which might not accord with international law.”<sup>627</sup>

The report found that grave, systematic violations of human rights were committed both by the GoSL and the LTTE. The report also strongly criticized impunity in Sri Lanka, and argued that “it is essential that absolute priority be given to carrying out deep seated reforms which bring about institutionalised accountability.”<sup>628</sup> The report also recommended that the GoSL implement a sweeping transitional justice program that included investigations, prosecution, and punishment of perpetrators of abuses.<sup>629</sup> The report also pointed out that Sri Lanka lacked legislation to prosecute international crimes,<sup>630</sup> and suggested that the Sri Lankan legal system might lack the capacity to prosecute systematic, large-scale violations of international human rights.<sup>631</sup> Therefore, although it stopped short of recommending international prosecution, the report recommended that Sri Lanka incorporate international elements into its domestic justice system for large-scale human rights cases.<sup>632</sup> It suggested hybrid courts or integrating international investigators and legal professionals into the current system.<sup>633</sup>

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<sup>625</sup> Ibid, p. 6

<sup>626</sup> Ibid, p. 6

<sup>627</sup> Ibid, p. 11

<sup>628</sup> Ibid, p. 230

<sup>629</sup> Ibid, p. 230

<sup>630</sup> Ibid, p. 231

<sup>631</sup> Ibid, p. 242

<sup>632</sup> Ibid, p. 243

<sup>633</sup> Ibid, p. 243

The GoSL's response to this report differed dramatically from previous instances. Remarkably, a spokesperson for the Sri Lankan cabinet expressed their commitment to investigating and prosecuting any perpetrators of human rights abuses, up to and including former President Rajapaksa, saying "Where even the president or other commanders or defence secretaries - whoever - is involved, our government is ready to take action."<sup>634</sup>

This report did not lead, however, to a more internationalized approach to prosecution. Shortly after its publication, the US sponsored a HRC resolution supporting Sri Lanka's domestic justice mechanisms dealing with systematic violations of human rights.<sup>635</sup> In doing this, the US threw its weight against an international probe and international involvement in criminal accountability for Sri Lankan perpetrators. In September 2015, about six months after the publication of the report, the GoSL revealed plans for a truth and reconciliation commission that did not include prosecution.<sup>636</sup>

I submit that it is not a coincidence that the report that contained the strongest call for some kind of internationalized accountability mechanism provoked the strongest response from the Sri Lankan government, and the most credible commitment to make changes in the area of post-conflict accountability. The Sri Lankan government reacted to the OHCHR's report not only with resistance and condemnation, but by publicly stating that they were willing to hold leaders to account and by creating a new domestic justice mechanism in direct response. This reflects one of my theory's central contentions: when

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<sup>634</sup> "UN Human Rights Council urges Sri Lanka war crimes court" *BBC* September 19, 2015 <https://www.bbc.com/news/world-asia-34266471> Accessed March 25, 2019.

<sup>635</sup> Bastians, Dharisha. "Biswal Bullish!" *Daily FT* August 27, 2015 [http://www.ft.lk/article/463131/Bullish-Biswal-Accessed March 25, 2019](http://www.ft.lk/article/463131/Bullish-Biswal-Accessed%20March%2025,%202019)

<sup>636</sup> "UN Human Rights Council urges Sri Lanka war crimes court" *BBC* September 19, 2015 <https://www.bbc.com/news/world-asia-34266471> Accessed March 25, 2019.

faced with the prospect of being held accountable in an international venue, leaders will elevate post-conflict justice on the peace-building agenda in an effort to evade international accountability.

However, a reasonable counterargument is that the Sri Lankan government only committed to creating a truth and reconciliation commission, which on paper, is not substantially different from the presidential commissions of inquiry and the LLRC that had come before. This is true, and further throws the ICC's singular role into relief. The OHCHR report stopped short of calling for full international prosecution, and instead called for prosecution with internationalized elements. Further, the fact that the ICC was not involved in the situation meant that Sri Lanka was not bound by the Rome Statute to create a domestic alternative that would meet the standards of the Rome Statute. In other words, while calls for internationalized prosecution can elevate post-conflict justice on leaders' agendas, due to its unique institutional design, the presence of the ICC is far more powerful in promoting the inclusion of actual accountability for leaders on the post-conflict justice agenda, because the ICC is the only human rights promoter that can directly threaten leaders' exit options.

## **6.0 The implications for the ICC**

Sections 4 and 5 of this chapter shows that Sri Lanka's peace process was heavily internationalized, and that human rights advocates were vocal about the issues of impunity and accountability. Nonetheless, the prospect of post-conflict human rights accountability for leaders did not affect either side's decision to come to the negotiating table, nor did it affect how they engaged in peace negotiations. In this section, I argue that this was because although domestic human rights NGOs, international human rights



NGOs, international organizations, and external states were deeply involved in advocating against impunity in the conflict, in the absence of the ICC, none of these actors' messages on avoiding impunity could credibility affect leaders' calculations about their exit options.

Further exacerbating the futility of these messages was the fact that Sri Lanka's justice system, both due to capacity issues and due to government intransigence, was not a viable option for post-conflict prosecution, meaning that, in the absence of the ICC, there was no appropriate venue for prosecutions of grave, large-scale human rights violations. In this section, I draw on evidence from the previous seven sections to make this argument, which applies equally to domestic human rights NGOs, international human rights NGOs, international organizations, and external states.

Domestic human rights NGOs advocated vocally against impunity throughout the conflict and the peace process, and at times advocated for criminal prosecution. Most notably, the UTAHR pointedly criticized Norway's approach to the 2002 peace process, saying they were enabling impunity for leaders in the conflict, and calling for criminal accountability.<sup>637</sup> However, this statement did not change Norway's approach to the peace process, and, in the absence of a potential prosecutor, could not represent a credible threat to leaders' post-conflict exit options.

International human rights NGOs were arguably the most vocal, persistent, and strident advocates against impunity and for criminal accountability for grave human rights abuses. Again, their messages did not seem to prompt belligerents to come to the negotiating table or change their behavior once there. Perhaps the starkest example of how international human rights NGOs' advocacy against impunity did not affect leaders'

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<sup>637</sup> Moolakkattu, "Peace facilitation by small states: Norway in Sri Lanka." p. 394-395

calculations about their exit options is the fact that the period where these messages increased in volume and in insistence also saw an increase in civilian targeted and mass, grave human rights violations by both the GoSL and the LTTE. Further, international NGO pressure did not affect the GoSL or the LTTE's approach to peace negotiations, as shown most starkly by both sides' empty commitments to improved compliance with international humanitarian law during a February 2006 negotiation brokered by the ICRC.<sup>638</sup>

Perhaps the most dramatic example of advocacy for international criminal accountability mattering less in the absence of the ICC is the role of international organizations in the Sri Lankan civil war. In particular, many organs of the UN advocated consistently and strongly against impunity, and even their calls for accountability were met with no demonstrable change in each side's approach to peace. Take for example, each side's March 2003 pledge that they would draft a joint statement on human rights and humanitarian practices.<sup>639</sup> The fact that they made this commitment at the behest of a UN Special Representative on Human Rights, combined with the fact that they never met to draft the pledge after the commitment, suggests that UN advocacy against impunity was not enough to make leaders treat human rights accountability as a serious issue during negotiations. Further, throughout the most intense period of the fighting, the UNHCR, the UN Special Representative on IDPs, and UNICEF issued several strong statements condemning human rights violations and calling for accountability. None of these statements seemed to affect how either side fought the war, nor did they incentivize either side to come to the negotiating table.

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<sup>638</sup> HRW, "Improving Civilian Protection in Sri Lanka," September 2006, p. 51

<sup>639</sup> Sorbo et al., "Pawns of Peace," p. 41

This shows that although UN organizations have powerful megaphones, they have neither the institutional mandate nor the raw capacity to constrain leaders' exit options. UN organizations can issue calls for accountability, and even recommend prosecution, but they do not have the wherewithal to mount prosecutions themselves. Therefore, even when a UN organization recommends prosecution, if this recommendation is not matched by the involvement of the ICC, this recommendation cannot represent a credible threat to a leader's prospects for a good post-conflict future.

Finally, even powerful external states' calls for human rights accountability could not constrain leaders' exit options because they were not backed by an institution that could actually carry out prosecutions. Most dramatically, in October 2007, the US called for a UN human rights monitoring mission in Sri Lanka to collect information about ongoing human rights violations and ensure accountability.<sup>640</sup> However, the US did not call for a corresponding international institution to actually mount an accountability mechanism in the likely event that Sri Lanka did not. The fact that there was no prosecutor in place to act on whatever information collected from such a monitoring mission meant that even though a state as powerful as the US advocated for such a mission, it could not represent a credible constraint on leaders' exit options.

Unsurprisingly, neither the GoSL nor the LTTE changed their strategy for war or peace in response.

## **7.0 Conclusion**

This chapter shows that Sri Lanka's peace and post-conflict transition process had a louder, bigger, and more diverse set of anti-impunity advocates than either Uganda's or

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<sup>640</sup> Human Rights Watch "Return to War," p. 13-14

Colombia's. If the ICC only promotes peace because it galvanizes anti-impunity advocacy, then anti-impunity advocacy should matter in the same way with or without the involvement of the ICC. If this explanation held, the strength of anti-impunity advocacy in Sri Lanka should have promoted the creation of a robust negotiated settlement to end the civil war. Instead, it barely mattered.

This suggests that the involvement of the ICC in a conflict situation makes anti-impunity advocacy matter differently than it would otherwise. I argue that this is because the ICC is the only institution with a global reach that actually has the capacity to make good on the normative commitment to prevent impunity. When the ICC is involved in a situation, a chorus of anti-impunity advocates mean that leaders need to consider what the Court's involvement means for their exit options, and how they can neutralize this threat using the peace process. When the ICC is not involved, as the case of Sri Lanka shows, for leaders, this chorus is nothing more than noise.

## **CHAPTER 7 | CONCLUSION**

### **1.0 The objectives**

Since the ICC's inception, researchers, practitioners, and human rights advocates have debated whether the ICC lives up to its promise. This dissertation is situated within this conversation, but instead of assessing the ICC broadly, it sought to understand how the ICC affects ongoing conflict situations. In light of the especially robust debate on how international criminal accountability impacts the possibilities for peace, this dissertation sought to do several things.

First, out of a conviction that it is impossible to understand prospects for peace without breaking the peacemaking process into its constituent parts, this dissertation did not seek to broadly understand how the ICC affects post-conflict transitions, but instead sought to narrowly understand how the involvement of the ICC in a peace process affects leaders' willingness to arrive at a comprehensive peace agreement. Since building peace after conflict is almost always predicated on the establishment of a comprehensive peace framework, this dissertation examines how the ICC promotes or prevents the establishment of such frameworks. To my knowledge, this is the only piece of scholarship that specifically holds the establishment of a peace agreement as its dependent variable, and that does not conflate the existence of such an agreement with lasting peace.

Second, this dissertation sought to reconcile the viewpoints of ICC proponents and ICC skeptics into a theoretical framework that incorporates the observations of both groups. To do this, I argued that the ICC's effects on peace processes are fundamentally

conditional, and used cross-national quantitative analysis and three case studies to make this case.

Finally, and relatedly, this dissertation sought to merge understandings of the ICC as a prosecutor and the ICC as an international promoter of anti-impunity norms. In particular, this dissertation shows how the ICC's prosecutorial function, even when it is not wielded, conditions and in some cases enhances its work promoting anti-impunity norms. In doing so, this dissertation asserts that, in peace-building situations, the ICC cannot and should not function the way other human rights advocates do, simply because it has the potential to prosecute culpable leaders.

## **2.0 The findings**

Chapter 2 established a theoretical framework that argued that the way the ICC affects peace processes depends on the role it plays in the conflict situation, and that the role it plays in the conflict situation in turn depends on a set of conditional factors. I argue that the Court can act either as an overseer or as a prosecutor in conflict situations, and that its role can evolve from overseer to prosecutor. When the Court acts as an overseer, I argue that peace negotiations are more likely to result in a comprehensive peace agreement. When the Court acts as a prosecutor, I argue that peace negotiations are more likely to fail because it moves from a latent to active threat to leaders' exit options, thus incentivizing leaders to leave peace negotiations in hopes that continuing the fight will secure them better post-conflict futures.

Chapter 2 also argues that whether the Court plays an oversight or prosecutorial role depends both on the actions of the Court and on the actions of the constellation of peace and human rights promoters that surround it. Two of these factors are within the

Court's control: whether the Court moves from an investigation to the issuing of indictments, and whether the Prosecutor adopts a publicly prosecutorial presence. However, one crucial factor is not within the Court's control: whether other actors magnify or contradict the Court's anti-impunity commitments also conditions whether it functions as an overseer or as a prosecutor.

Chapter 3 offers empirical evidence for the dual role that international prosecutorial bodies can play in peace negotiations. In this chapter, I conducted quantitative analysis of a dataset of 367 peace negotiations between 48 states and 89 rebel groups, spanning 1989 to 2010. By specifying logistic regression models, I found that, when controlling for other justice mechanisms, the involvement of an international prosecutorial body made peace negotiations both more likely to fail, and more likely to succeed. In other words, international prosecution made peace negotiations more to see one party not come to the table, and more likely to result in a comprehensive agreement that established a framework for a new government. This suggests that in some cases, international prosecution spoils peace negotiations, and in other situations, it promotes their success. Chapters 4, 5 and 6 were dedicated to parsing out what differentiates these two sets of situations, and to illustrating the theory articulated in Chapter 2.

Chapter 4 examines what is perhaps the classic case of the ICC acting as a spoiler in peace negotiations: the attempts to end the LRA insurrection in northern Uganda through a negotiated settlement.<sup>641</sup> In this case, I assert, the Court played a prosecutorial role, and it was only after it began to play this role in Uganda that it acted as a spoiler of the peace. Crucially, I contend that this case shows that the Court issuing indictments is

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<sup>641</sup> Branch, "Uganda's civil war and the politics of ICC intervention."

not enough, by itself, to make the Court play a prosecutorial role. Instead, the case of Uganda shows that it is this event, combined with the Court's public stances and the public skepticism of human rights advocates and peace guarantors, which results in the Court playing a prosecutorial role.

Chapter 5 then turns to the Colombian peace process, in which I demonstrate that the ICC acted as a guarantor<sup>642</sup> because it played the role of overseer, rather than prosecutor. Again, I argue that the fact that the Court did not issue indictments in Colombia, and only remained in an investigatory phase, was not the only reason the Court was able to act as an overseer and not a prosecutor. Also crucial was the careful, quiet public stance taken by the Prosecutor's Office, always emphasizing the ICC's presence in Colombia and normative commitments of the Rome Statute, but never specifically calling for international prosecution and thus elevating international prosecution from a latent to an active threat to leaders' exit options. Finally, I argue that human rights and peace advocates' vocal insistence that the peace process live up to the Rome Statute's normative commitments enabled the ICC itself to stay quiet, and thus facilitated its oversight role.

This leads to the obvious question of whether other advocates' insistence that impunity for culpable leaders is unacceptable is actually what results in a more robust peace agreement, and if the ICC's role is more epiphenomenal than my theory admits. To examine this question, Chapter 6 turns to the case of Sri Lanka, which saw a similar set of advocates arguing vociferously and constantly against impunity, but without the involvement of the ICC at any point in the conflict situation. Chapter 6 closely examines the highly internationalized peace process that occurred from 2000 to 2006. Although

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there was intense advocacy against impunity, the ICC was not involved and international criminal accountability was not discussed. I argue that this laid the groundwork not only for the failure of the peace process, but for the final battles of the war, during which both sides used human rights abuses as the backbone of their battle strategies.

### **3.0 The findings' limitations**

One potentially important conditioning factor that this dissertation did not systematically take into account is the balance of military power in the conflict. Chapter 3 mentioned that one possible alternative explanation for the fact that international prosecution promotes more comprehensive peace agreements is that it might be used in situations where there is a clear military victor, meaning that the losing side is too weak to do anything but accept the terms of the peace agreement.

The consensus in the peace negotiation literature is that both sides will come to the table when neither has the military wherewithal to definitively defeat the other,<sup>643</sup> meaning that there is a certain range of military power balances during which peace negotiations will happen.<sup>644</sup> It is also likely the case that there is a certain range of military power balances during which the ICC has the conditional effects described in this dissertation. Future work should more systematically take military power dynamics into account and endeavor to specify this range.

This study also says nothing about whether the peace lasts. The signature of a peace agreement is far from a guarantee that the country will see lasting peace; many

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<sup>643</sup> Walter, *Committing to peace*.

<sup>644</sup> Hegre, Håvard. "The duration and termination of civil war." *Journal of Peace Research* 41, no. 3 (2004): 243-252; Acemoglu, Daron, Andrea Vindigni, and Davide Ticchi. "Persistence of civil wars." *Journal of the European Economic Association* 8, no. 2-3 (2010): 664-676.

counties that achieve comprehensive agreements devolve into civil war again,<sup>645</sup> or see governments that commit massive human rights abuses during “peacetime.”<sup>646</sup> Chapter 5 analyzed some encouraging evidence from Colombia indicating that the ICC can act as a guarantor of peace agreements once they are signed, and thus act to implement peace agreements in a fragile phase. Still, much more systematic work needs to be done to see whether the ICC can act to ensure that peace agreements are successfully implemented in ways that promote lasting peace.

Finally, and perhaps most importantly, this study does not shed any light on whether criminal accountability is necessary for long-term peace and healing. This is, perhaps, the central limitation on only asking about how international criminal accountability affects the prospects for signing a comprehensive peace agreement. The finding that not explicitly wielding the prosecutorial stick during peace negotiations makes the ICC an effective guarantor only sheds light on what happens during peace negotiations, and should absolutely not be misconstrued as the flawed argument that in order to achieve peace, justice should be withheld. Instead, this dissertation only sheds light on the reality that criminal accountability is almost certainly more constructive at certain phases of the peace process than others.<sup>647</sup> Future work needs to be done to determine exactly when it is most effective.

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<sup>645</sup> Walter, Barbara F. "Does conflict beget conflict? Explaining recurring civil war." *Journal of Peace Research* 41, no. 3 (2004): 371-388; Quinn, J. Michael, T. David Mason, and Mehmet Gurses. "Sustaining the peace: Determinants of civil war recurrence." *International Interactions* 33, no. 2 (2007): 167-193; Call, Charles T. *Why peace fails: the causes and prevention of civil war recurrence*. Georgetown University Press, 2012; Fortna, Virginia Page. *Peace time: Cease-fire agreements and the durability of peace*. Princeton University Press, 2018.

<sup>646</sup> Ghobarah, Hazem Adam, Paul Huth, and Bruce Russett. "Civil wars kill and maim people—long after the shooting stops." *American Political Science Review* 97, no. 2 (2003): 189-202.

<sup>647</sup> Geis, Jacqueline, and Alex Mundt. *When to Indict?: The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action*. Brookings Institution-University of Bern Project on Internal Displacement, 2009.

#### 4.0 The research implications

Skeptics of prosecution and proponents of amnesty argue that the ICC spoils peace negotiations because, when the ICC is involved, leaders do not see peace negotiations as an opportunity to negotiate good post conflict fates, and for this reason, they will not engage.<sup>648</sup> Amnesty proponents are right on the charge that leaders will not engage in negotiations if they think they cannot use them to avoid post conflict punishment. However, I find that the involvement of the ICC does not mean that leaders will decide that they cannot use peace negotiations to secure favorable post conflict fates. Instead, I find that this perception partially depends on whether the ICC plays a prosecutorial or oversight role.

When the ICC plays a prosecutorial role, Court skeptics and amnesty advocates are right about its effects, as shown by what happened in Uganda. And yet, when the ICC plays an oversight role, the case of Colombia shows that the ICC's involvement in a conflict situation might enhance leaders' confidence that they can use negotiations to protect their post-conflict self-interests, and thus might incentivize them to engage in peace negotiations.

Proponents of the Court argue that true peace is impossible when it is not accompanied by accountability.<sup>649</sup> As Prosecutor Bensouda stated to an audience of peace

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<sup>648</sup> Goldsmith and Krasner. "The limits of idealism."; Snyder and Vinjamuri. "Trials and errors: Principle and pragmatism in strategies of international justice."; Prorok, "The (In) compatibility of peace and justice? The International Criminal Court and civil conflict termination."; Krcmaric, "Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice."

<sup>649</sup> Akhavan, "Beyond impunity: can international criminal justice prevent future atrocities?."; Roht-Arriaza, Naomi. "Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala." *Chi. J. Int'l L.* 9 (2008): 79; Stromseth, Jane. "Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?." *Hague Journal on the Rule of Law* 1, no. 1 (2009): 87-97; Clark, Janine Natalya. "Peace, justice and the International Criminal Court: Limitations and possibilities." *Journal of International Criminal Justice* 9, no. 3 (2011): 521-545.

negotiators, “Violence left untamed by the virtues of justice will beget a cycle of violence.”<sup>650</sup> There are countless examples to suggest that this is often true. Still, it is not within the scope of this dissertation to systematically investigate this claim; future work should.

What this dissertation does suggest is that the *way* that the virtues of justice are applied matter for whether they secure peace or beget more violence. The case of Uganda shows that when justice is presented as a cudgel that will inevitably descend on leaders once peace is made, the specter of that cudgel will spur more violence, as culpable leaders will decide to fight in hopes of avoiding it. Put succinctly, when the specter of international criminal accountability is not strategically deployed, it can further incentivize leaders to fight.

Further, the case of Sri Lanka suggests that the absence of credible mechanisms to hold leaders to account for their decisions in conflict can change leaders’ incentive structures to make battle strategies that are predicated on massive, deliberate human rights violations more attractive. In other words, even the most latent threat of accountability may deter leaders from ordering mass atrocities. Taken together, this suggests that although international criminal accountability requires careful, strategic, constant calculation, its absence is perhaps even more dangerous. As Julian Barnes writes, “All solutions are flawed, but the most flawed was to do nothing, and to do nothing slowly.”<sup>651</sup>

This suggests that ICC optimists and skeptics are both partially, but not, completely right, and that we need to move beyond the binary question of whether the

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<sup>650</sup> “Oslo Forum Meeting Report,” p. 27

<sup>651</sup> Barnes, Julian. *The Porcupine*. New York: Alfred A. Knopf, 1992. p. 38

ICC helps or hurts in conflict situations, and whether international prosecution promotes or prevents peace. Rather, we should turn our attention to the circumstances in which the ICC promotes peace. Further, we should ask these questions not with the central goal of evaluating the Court's efficacy or worth overall, but rather of discerning which approaches it should use to best accomplish its mission.

## **5.0 External Validity**

### **5.1 For criminal tribunals writ large**

The ICC is far from the only criminal tribunal that might constrain leaders' exit options, and so to understand this dissertation's external validity, I turn to the question of whether these findings might extend to other mechanisms of criminal accountability that might be involved in conflict situations: domestic courts, regional courts, and hybrid courts.

These findings are not applicable to domestic courts for the simple reasons that domestic courts are domestic and not international, and because they are, by virtue of institutional design, less able to play the same oversight role that the ICC can. The fact that domestic courts are domestic means that rebels are likely to view domestic courts as a tool of government power.<sup>652</sup> The ICC was able to serve as a guarantor in Colombia precisely because its gaze was on both the government and the rebels—a much less likely situation in the case of domestic courts.

The ICC was also able to serve as a guarantor in Colombia because, by virtue of the fact that its involvement remained in the preliminary examination phase, it was able to play an oversight role. Most domestic courts do not have a preliminary examination phase: the goal of their investigations is not to determine whether a case should be

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<sup>652</sup> Dancy and Wiebelhaus-Brahm. "The impact of criminal prosecutions during intrastate conflict."

brought, but to gather enough evidence to actually bring a case.<sup>653</sup> Thus, they are designed to only play a prosecutorial function, and not the kind of oversight function that the ICC can play.<sup>654</sup>

It is impossible to generalize about whether these findings apply to regional courts because the institutional designs and mandates of regional courts vary so broadly. The key reason why the ICC can act as both a guarantor and a spoiler of civil conflict is that, by virtue of its institutional design, it has the capacity to not only act as a prosecutor, but as an overseer with the potential to prosecute. To the extent that a regional court is designed similarly, it should have the same effects as the ICC. For example, there is evidence that the InterAmerican Court of Human Rights might be able to play the role of guarantor. Its long and well-institutionalized investigative process, which highly incorporates human right advocates from civil society,<sup>655</sup> equips it to play an oversight role that is similar to or perhaps even more effective than the ICC's. However, the fact that it does not have the capacity to punish leaders, and instead relies on states to implement its rulings through the domestic justice system<sup>656</sup> means that it cannot directly threaten leaders' exit options and is unlikely to play the same role as a spoiler.

However, if a regional court, by virtue of its institutional design or capacity limitations, cannot play both an oversight and prosecutorial role, it is unlikely that it will

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<sup>653</sup> Ibid, p. 51

<sup>654</sup> A key caveat about this argument is that it assumes that domestic courts are legitimate, impartial, capable institutions designed to promote the rule of law and not the interests of the administration in power. As Dancy and Wiebelhaus-Brahm detail, this is often far from the case. In such instances, domestic courts are even less likely to be guarantors.

<sup>655</sup> Couso, Javier, Alexandra Huneeus, and Rachel Sieder, eds. *Cultures of legality: judicialization and political activism in Latin America*. Cambridge University Press, 2010.

<sup>656</sup> Hillebrecht "The domestic mechanisms of compliance with international human rights law: Case studies from the Inter-American human rights system."; Huneeus, Alexandra. "International criminal law by other means: the quasi-criminal jurisdiction of the Human Rights Courts." *American Journal of International Law* 107, no. 1 (2013): 1-44.

affect peace negotiations in the same way that the ICC can. A possible example of this is the European Court of Human Rights, whose “docket crisis”<sup>657</sup> constrains its potential to act as either an overseer or a prosecutor.

Whether a hybrid court can play the same dual role as the ICC depends, again, on its institutional design, but also on the timeline of its implementation. Some hybrid courts are established during the peace process, and are often implemented along with the negotiated settlement. The theory articulated in this dissertation should not be applicable to these courts, as it presupposes that the prospect of international prosecution exists throughout the informal and formal phase of peace negotiations, and does not arise once the peace process is already underway.

However, if the hybrid court is extant, and has jurisdiction over a conflict situation where the parties are attempting to make peace, these findings might hold if it has the institutional capacity to play both an oversight and prosecutorial role. One potential example is the ICTY after the first five years of its mandate, which lasted from 1993 to 2017. A key part of this is the fact that the ICTY’s mandate gave it jurisdiction for crimes committed from 1991 onwards,<sup>658</sup> meaning that leaders fighting in later phases of the conflict had been habituated to the tribunal’s existence and knew that they fell under its jurisdiction.

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<sup>657</sup> Helfer, Laurence R. “Redesigning the European Court of Human Rights: embeddedness as a deep structural principle of the European human rights regime.” *European Journal of International Law* 19, no. 1 (2008): 125-159.

<sup>658</sup> United Nations International Criminal Tribunal for the Former Yugoslavia “Mandate and Crimes under ICTY Jurisdiction” *United Nations International Residual Mechanism for Criminal Tribunals* <http://www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction> Accessed March 25, 2019

## 5.2 For international institutions

The ICC brings leaders to the table precisely because it has the ability to constrain their exit options, and they negotiate peace with the hopes of definitively removing that potential constraint. However, if leaders perceive that the Court will inevitably constrain their exit options, ICC involvement can galvanize them to abandon talks and resume the fight. This is the prosecution paradox: the ICC can act as a guarantor in peace negotiations precisely because it has the capacity to prosecute culpable leaders, but once this capacity is actually wielded, the ICC becomes a spoiler of the peace. The mechanism is similar to that by which Harry Potter recovers the Sorcerer's Stone in his first year at Hogwarts. As Albus Dumbledore said, "It was one of my more brilliant ideas, and between you and me, that's saying something. You see, only one who wanted to *find* the Stone – find it, but not use it – would be able to get it..."<sup>659</sup>

The prosecution paradox raises questions that strike to the core of how international institutions work, and how they can best carry out their mission. Skeptics of international institutions often point to the fact that they are not endowed with sufficient resources to actually comprehensively carry out their missions as they are elucidated on paper. My dissertation suggests that perhaps, at least in the case of the ICC, this is not the point. Perhaps international institutions work best not so much by fully executing their missions, but by sheer virtue of the fact that they have a mandate to do so.

Other skeptics of international institutions point to the primacy of the sovereignty norm in the international system, and state that no international institution can be truly effective while states remain the highest power in the international system. This dissertation also suggests that this reasoning is flawed. The ICC deters atrocity and

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<sup>659</sup> Rowling, J. K.. *Harry Potter and the Sorcerer's Stone*. Scholastic Press. 1997.



promotes peace not by coercing leaders, but by slightly changing their cost-benefit analyses so as to make restraint in conflict and engaging in the peace process slightly more attractive. By simply adding the remote threat of prosecution to the set of leaders' possible post-conflict fates, the ICC makes engaging in peace negotiations more attractive to leaders, and thus more likely. Thus, the ICC works most effectively to deter future human rights violations not by overcoming or contravening sovereignty, but by slightly modifying the attractiveness of options leaders already face. Perhaps international human rights institutions do their best work not by compelling leaders to act according to human rights norms, but by changing their incentives so that promoting human rights norms become more attractive.

## **6.0 The policy implications**

This argument has policy implications for states attempting to negotiate peace to end civil wars, human rights and peace advocates, and most importantly, the ICC itself. This section addresses each group in turn.

These findings strongly suggest that state attempts to use an ICC investigation as a lever of compellance to get rebels to the table is too risky to ever be worthwhile if the state's intention is actually to create a negotiated settlement.<sup>660</sup> As the GoU learned during the Juba Peace Process, once an ICC investigation has been opened, the state loses even more control of a crucial variable in the peace process: the menu of options for rebel leaders' post-conflict fates. States should be aware that, in inviting the ICC to open an

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<sup>660</sup> However, states engage in peace negotiations for reasons that do not include actually making peace. Candidly and unfortunately, if the state seeks to go through the motions of a peace process, but does not actually want that peace process to result in a negotiated settlement that contains meaningful changes to the government, and only cares about what its engagement in that peace process signals to audiences it cares about, inviting the ICC to investigate rebel human rights abuses is shrewd strategy. Therefore, the ICC should be discerning about a state's motives in inviting investigations.

investigation into a conflict situation, while they may indeed get the leverage they need to get the rebels to come to the table, they also may be setting the stage for the collapse of a negotiated settlement. Therefore, states for which the peace process is really about making peace should not invite the ICC to open investigations into their rebel counterparts.<sup>661</sup>

The biggest implication that these findings hold for human rights and peace advocates is that they should refrain from public statements that contradict the ICC's normative commitment against impunity. Such statements can prompt the ICC to publically reaffirm its commitment to prosecuting culpable leaders, and thus transition from an oversight to a prosecutorial role. In particular, civil society organizations—especially those who claim the same normative commitments as the ICC—should refrain from publicly even hinting at acceptance of the possibility of amnesty for culpable leaders. A better way of reframing such suggestions would be public affirmations that a panoply of justice options should remain in consideration throughout the peace process, and that the commitment to prevent impunity does not necessitate a specific, prescribed course of action. In this way, advocates can signal that international prosecution is a possibility, and thus galvanize leaders to be at the table in an effort to remove the possibility, while maintaining assurance that it is not a certainty, thus helping to prevent leaders from deciding that resuming the fight is more likely to result in better post-conflict fates.

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<sup>661</sup> One interesting theoretical possibility—although it has never happened and almost certainly never will—is that the state could both draw rebel leaders to the negotiating table and ensure that the ICC acts as a guarantor in the negotiating process by inviting the ICC to investigate human rights abuses attributed not only to rebel actors in a conflict situation, but also to state actors, and publicly emphasize its interest in holding state actors accountable for human rights violations.

One reason human rights advocates will publicly contradict the Court's normative commitments is that they perceive its involvement to be counter to the interests of the people directly affected by the conflict. In these cases, it is absolutely essential to keep in mind that it is almost always possible to elevate the viewpoints of these people without directly contradicting the Court's work or normative commitments. Elevating the voices of local populations who are perhaps skeptical of how international criminal accountability affects prospects for peace is absolutely essential, but instead of explicitly framing their perspectives in contrast to the ICC's work, human rights advocates should simply amplify their voices. Where local perspectives explicitly contradict the ICC's work, advocates' first steps should be to raise these issues with the Court directly, insistently and quietly, and broker more opportunities for the Court to directly connect with the locals expressing these views.

This dissertation has two key implications for the way the ICC works in conflict situations. First, the finding that whether the ICC plays a prosecutorial role is not solely about whether the ICC has issued arrest warrants for culpable leaders is absolutely essential. The ICC should keep at top of mind that whether culpable leaders perceive them to be potential punishers has as much to do with the public statements they make about their work as it does with the work they are actually doing.

Second, this dissertation calls into serious and unsettling question whether the ICC should ever unseal or even issue arrest warrants for leaders involved in either formal or informal peace negotiations in a conflict whose only foreseeable end is a negotiated settlement. The case of Colombia shows that it is completely possible for the Court to

advance its anti-impunity mission, and to ensure criminal accountability for leaders, without issuing arrest warrants or even opening a formal investigation.

If, however, the conflict is likely to end not in negotiated settlement, but in decisive victory, what happened in the final days of the Sri Lankan Civil War suggests that the threat of ICC prosecution might save lives. Empirical analysis of civilian casualties in Libya during the ICC involvement there bears this out.<sup>662</sup>

In the case of Sri Lanka, the government's military strategy to end the civil war was predicated on the tactical use of practices that the Rome Statute defines as atrocity crimes. Since the government was confident of its victory, and since the ICC was not involved in the Sri Lankan Civil War, government forces decided on this strategy with the assurance that they would not be held accountable for the massive abuses they committed. Upon consideration of the counterfactual situation in which the ICC had been involved in Sri Lanka, it is very possible that Sri Lankan leaders would have decided that the risk of international prosecution did not outweigh the benefits of a quick, decisive end to the conflict. Therefore, while ICC involvement might backfire in civil conflicts where negotiated settlement is the only foreseeable end, the ICC might also fulfill its mission and save lives by involving itself in conflicts that are likely to end in decisive victory.

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<sup>662</sup> Hillebrecht, Courtney. "The deterrent effects of the International Criminal Court: evidence from Libya." *International interactions* 42, no. 4 (2016): 616-643.